(24,194)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 22.

PENNSYLVANIA RAILROAD COMPANY

vs.

W. F. JACOBY & CO.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

	Page
Transcript of record from the district court of the United States for the eastern district of Pennsylvania	1
Docket entries	1
Writ of error	3
Petition	4
Exhibit "A"—Supplemental report of Interstate Commerce Commission, Harlan, C.	12
Supplemental orders of Interstate Commerce Commission	25
Exhibit "B"—Report of Interstate Commerce Commission, Harlan, C.	29
Orders of Interstate Commerce Commission	36
Order of court directing defendant to file plea, &c.	38
Demurrer	38
Opinion sur demurrer, Thompson, J.	40
Stipulation of counsel as to date of filing, &c.	55
Plea	56
Jury	56
Verdict	56

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 16, 1916.

Page

Bill of exceptions 57
Testimony of William F. Jacoby 58
Report of Interstate Commerce Commission, Harlan, C. 60
Order of Interstate Commerce Commission 66
Plaintiff rests 70
Testimony of Frank C. Stratton 72
Edmund C. Haley 76
James F. Clennon 77
Edmund C. Haley (recalled) 91
R. B. Freeman 95
Edmund C. Haley (recalled) 101
Statement showing discrimination, &c. 104
Statement showing discrimination, &c. 105
Testimony of William F. Jacoby (recalled) 106
Sidney J. Sanders 110
Defendant rests 111
Testimony of Isaac C. Weber 112
S. L. Clark 120
Statement showing distribution of cars 121
Statement showing aggregate ratings, &c. 122
Testimony of Edmund C. Haley (recalled) 123
Charge of the court, Thompson, J. 124
Stipulation of counsel as to bill of exceptions 140
Judge's certificate to bill of exceptions 141
Motion for judgment *non obstante veredicto* 141
Order of court refusing new trial, &c. 142
Order of court fixing counsel fees, &c. 142
Præcipe for judgment 143
Judgment 143
Petition for writ of error 144
Order of court allowing writ of error 144
Assignments of error 145
Præcipe sur transcript of record 156
Clerk's certificate 156
Order of argument and submission 157
Certificate of questions 157
Clerk's certificate 159
Writ of certiorari 160
Clerk's return to writ of certiorari 161

DOCKET ENTRIES.

IN THE
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF PENNSYLVANIA.

June Session, 1912.

Wm. A. Glasgow, Jr. — W. F. Jacoby and Isaac C. Weber, co-partners trading under the firm name of W. F. Jacoby & Company,

2008

vs.

John G. Johnson — Pennsylvania Railroad Company.

Proceeding to enforce orders of Interstate Commerce Commission.

1912 July	19	Petition filed. Order directing defendant to plead, answer or demur within thirty days of service of copy of this order filed.
" "	27	Proof of service of petition and order filed.
" August	8	Order for the appearance of John G. Johnson, Esquire, for defendant filed.
" "	17	Stipulation that defendant may plead, answer or demur on or before September 18, 1912, and that case be placed on trial list subject to such plea &c. filed.

"	September	18	Demurrer filed.
"	October	4	Argued.
"	November	12	Opinion, Thompson, J., overruling demurrer filed.
"	"	16	Plea filed.
"	December	7	Order to place case on trial list filed.
1913	March	3	Jury called.
"	"	4	Verdict for plaintiff $28,572.54.
"	"	8	Plaintiff's bill of costs filed.
			Motion for judgment *non obstante veredicto* filed.
			Motion and reasons for new trial filed.
"	"	24	Argued sur motions for new trial and for judgment N. O. V.
"	April	4	Order refusing motions for new trial and for judgment N. O. V. filed.
"	"	8	Bill of Exceptions filed.
"	May	19	Order allowing counsel fees and granting exception filed.
"	"	21	Præcipe for judgment filed. Judgment accordingly.
			Assignments of error filed.
			Petition for writ of error and order of allowance filed.
"	"	23	Bond sur writ of error in sum of $57,145.08 and order of approval filed.
			Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
			Citation allowed and issued.
			Præcipe sur transcript of record filed.
"	"	26	Citation returned "service accepted" and filed.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judge of the District Court of the United States for the Eastern District of Pennsylvania,

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you between W. F. Jacoby and Isaac C. Weber, co-partners trading under the firm name of W. F. Jacoby & Company, plaintiff, and Pennsylvania Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable J. Whitaker Thompson, Judge of the District Court of the United States, at Philadelphia, the 23rd day of May, in the year of

(SEAL) our Lord one thousand nine hundred and thirteen.

GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before THOMPSON, *J.*
Allowed—
BY THE COURT.
Attest—
GEORGE BRODBECK,
Deputy Clerk.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

W. F. JACOBY and ISAAC C. WEBER, co-partners, trading under the firm name of W. F. JACOBY & COMPANY,
Petitioners,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

PETITION.
Filed July 19, 1912.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioners, W. F. JACOBY and ISAAC C. WEBER, co-partners, trading under the firm name of W. F. JACOBY

& COMPANY, having their principal place of business in the City and County of Philadelphia, and State of Pennsylvania, and who are citizens and residents of the City of Philadelphia, State of Pennsylvania, in the Eastern District of Pennsylvania, humbly complaining show your Honors:

I.

Your petitioners are lawfully and rightfully entitled to receive, and do hereby claim from the defendant above named the sum of Twenty-one thousand ninety-four dollars and thirty-nine cents ($21,094.39) with legal interest from June 28th, 1907, to June 1st, 1912, amounting to Six thousand, two hundred and thirty-eight dollars and sixteen cents ($6,238.16), being the sum of Twenty-seven thousand, three hundred and thirty-two dollars and fifty-five cents ($27,332.55) with legal interest thereon from June 1, 1912, as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission, dated March 11th, 1912, a copy whereof is hereto attached, marked "Exhibit A", and prayed to be made and read as a part hereof, and in accordance with the several Acts of Congress in such case made and provided; and the defendant justly and legally owes to petitioners the sum above set forth, together with legal interest thereon from June 1st, 1912, and a reasonable attorney's fee to be taxed as part of the costs against defendant.

II.

The defendant prior to any and all dates mentioned in this petition was and now is a corporation incorporated under the laws of the State of Pennsylvania, and a common carrier engaged in interstate commerce by transportation or passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from points of

origin in Pennsylvania to points outside of Pennsylvania throughout the United States and to Canada and Mexico, and has its principal operating office in Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, through which said City and in which Eastern District of Pennsylvania the line of said defendant runs and is operated.

III.

During the period from April 1, 1904, to October 18, 1905, petitioners were lessees of a tract of bituminous coal land situated in Bigler Township, Clearfield County, Pennsylvania, and operated thereon a fully equipped colliery known as Falcon No. 2, which colliery was adjacent to the tracks of the Moshannon Branch of the Tyrone & Clearfield Railway, one of the main branches of defendant's line and operated by defendant as its Tyrone Division, and, during said period, petitioners were continuously engaged in mining coal at said mine and selling it to points outside of the State of Pennsylvania, and maintained at said colliery a full mining equipment and a sufficient force of employees. During the same period the daily capacity of said Falcon No. 2 mine was four hundred and fifty (450) gross tons of coal per working day, which quantity petitioners were always able and prepared during said period to mine, ship and sell, had they been supplied by the defendant with sufficient cars to transport the same, but defendant did not furnish plaintiffs with sufficient cars to transport their coal, as aforesaid, nor did it furnish to petitioners their proper pro rata of the cars upon defendant's line but in its distribution of railroad cars to mines along its line, the defendant unjustly discriminated against petitioners' mine, Falcon No. 2, and gave undue and unreasonable preference and advantage to mines operated by the Berwind-White Coal Mining Company and other shippers on the Tyrone Division, particularly to shippers whose mines were situated upon the Moshannon Branch of the Tyrone Di-

vision, in close proximity to Falcon No. 2, and having, in common with it, their sole outlet to market by way of defendant's lines, whereby defendant violated its duty as a common carrier and petitioners were put to great and unjust disadvantage and were unable to ship coal to market which they were able to mine, and for the sale of which they had orders for delivery to points outside the State of Pennsylvania, and because of defendant's refusal to adequately supply petitioners' need for cars, and because of such unjust discrimination against petitioners in the daily car distribution of cars upon defendant's line, and in particular upon the Tyrone Division, petitioners were damaged and suffered loss as producers, shippers and sellers of coal in the interstate coal trade and were deprived of profits which they would otherwise have made upon coal which they were unable to ship and sell, and for which they were unable to accept contracts, though such contracts were available, by reason of defendant's undue and wrongful discrimination and refusal to properly supply them with cars as aforesaid.

IV.

The mines owned, operated and controlled by the Berwind-White Coal Mining Company, and other favored companies, as aforesaid, are situated upon the Moshannon Branch of the Tyrone & Clearfield Railway, on the Tyrone Division of said respondent in close proximity to the Falcon No. 2 mine, owned by petitioners, and have a common outlet with petitioners' said mine to reach the markets for bituminous coal, either within or without the State of Pennsylvania, over the lines of the defendant company and there are no circumstances or conditions of carriage as against petitioners' mine, Falcon No. 2 aforesaid.

Between April 1, 1904, and October 18, 1905, petitioners made daily requests and gave daily orders for coal cars to be delivered to their said mine to be loaded with coal for

transportation to points and places beyond the State of Pennsylvania, but were denied and refused cars and were unduly and unreasonably discriminated against by respondent in the distribution of coal cars, whereby petitioners were at different times and for varying periods of time compelled to close their operation and hold their mine idle, whereby its miners and laborers removed and its organization and plant became demoralized and disorganized, and whereby petitioners were prevented from filling valuable contracts or from accepting and securing other valuable contracts, to their great damage as herein set forth.

During the periods from April 1, 1904, to April 1, 1905, and from April 1, 1905, to October 15, 1905, defendant arbitrarily assigned and furnished to the favored mines aforesaid in the Tyrone Division, not less than 63,284 "assigned" (arbitrary) cars, which said cars were assigned as "private", "commercial" and "company fuel" cars, and were not charged against the *pro rata* share of said favored mines in making up the distribution sheets for said division and did not enter into the distribution of the coal cars among the mines in the said Division, whereby said favored companies were given the cars aforesaid over and above and in addition to their fair *pro rata* of cars in the division, and were illegally and wrongfully preferred in car distribution as aforesaid in said division. And during the same periods petitioners' mine, Falcon No. 2, received only a few arbitrary cars, and these were charged against said mine's distributive share in the ratings for the division.

During the same periods respondent unduly and unjustly discriminated against the Clearfield Division in which petitioners' said mine was located by the arbitrary award of not less than 640 coal cars per day to other divisions, for the use of favored mines in said divisions, over and above the proper proportion to which said divisions were properly entitled, to

the prejudice of non-favored mines in the Clearfield Division, and in particular of your petitioners' mine, Falcon No. 2.

V.

The petitioners, in June, 1907, duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices of defendant to the prejudice of petitioners and in violation of the Act to Regulate Commerce, approved February 4th, 1887, and Acts amendatory and supplemental thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainants therein reparation in damages to such an amount as it might be ascertained that said complainants had thereby suffered. Defendant, being duly served with a copy of said Complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties, thereto, and submitted, and resulted in a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., on Docket No. 1139, Opinion No. 1384, dated March 7, 1910, a copy of which finding with the conclusions and orders of the Commission is hereto attached and marked Exhibit B, and made a part of this petition.

VI.

After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of fact and of law on the part of complainants and of defendant, upon the question of reparation alone, there resulted a further finding regularly and properly made by the Commission on March 11th, 1912, ordering the defendant to make reparation to petitioners as in paragraph one of this petition above set forth, and as fully appears in the copy of the report, conclusions and order of the Interstate Commerce Commission in Opinion No. 1833, Docket No. 1139, dated

March 11, 1912, a certified copy whereof is hereto attached, marked Exhibit A, and made a part of this petition.

VII.

Petitioners aver that a true copy of the aforesaid order of the Interstate Commerce Commission dated March 11, 1912, Opinion No. 1833, Docket No. 1139, was duly served upon defendant in the above entitled cause, and demand made that defendant pay petitioners the sum claimed in this petition, and as set forth in the aforesaid Order of the Commission, dated March 11, 1912, Exhibit C, hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum or any part thereof has been paid by defendant or any one on its behalf to petitioners or any one in their behalf. Wherefore petitioners have instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof or supplemental thereto.

Wherefore the said W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Co., as aforesaid, respectfully pray:

First.—That your Honorable Court enter a rule and order upon the said defendant, the Pennsylvania Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second.—That your Honorable Court will, by its order, fix a time and place for a trial of this cause, under the provisions of the Act to Regulate Commerce aforesaid.

Third.—That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

Fourth.—That your Honorable Court will enter judgment in favor of petitioners and against the said defendant, the Pennsylvania Railroad Company, for the sum of Twenty-seven thousand, three hundred and thirty-two dollars and fifty-five cents ($27,332.55) as hereinbefore set forth, with legal interest thereon from June 1st, 1912, and costs including a reasonable attorney's fee.

Fifth.—That your Honorable Court may make such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioners, as in duty bound, will ever pray, etc.

WM. A. GLASGOW, JR.,
Counsel for Petitioners.
1018 Real Estate Trust Building,
Philadelphia, Pa.

STATE OF PENNSYLVANIA, } ss.
COUNTY OF PHILADELPHIA. }

W. F. Jacoby, being duly sworn, deposes and says that he is one of the petitioners in the above entitled cause, and that the facts set forth in the foregoing petition are true and correct, to the best of his knowledge, information and belief.

W. J. JACOBY.

Sworn and subscribed to before me this eighteenth day of July, A. D. 1912.

JOHN H. HALL,
Notary Public.

(SEAL.)

My commission expires Jan. 16th, 1915.

"EXHIBIT A."

Opinion No. 1833.

INTERSTATE COMMERCE COMMISSION.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

Submitted April 20, 1911. Decided March 11, 1912.

Reparation awarded for damages resulting from discriminations practiced by the defendant in the distribution of coal cars.

David L. Krebs, Harry White, and *A. M. Liveright* for

Hillsdale Coal & Coke Company and Clark Brothers Coal Mining Company.

William A. Glasgow, Jr., and *John H. Hall* for W. F. Jacoby & Company.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson and *James H. Gleason* for Bulah Coal Company.

George V. Massey, Francis I. Gowen and *Murray & O'Loughlin* for defendant.

SUPPLEMENTAL REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

In Joynes v. P. R. R. Co., 17 I. C. C. 361, it was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Commission was not authorized under the act to award damages of that character. The general principle announced was that money demands of that nature, arising out of discriminations ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts and that our jurisdiction extends to what is there referred to as rate damages as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they were still under consideration and after our conclusions in Joynes v. P. R. R. Co., *supra*, had been announced, the Circuit Court of the

United States for the Eastern District of Pennsylvania, in Morrisdale Coal Co. v. P. R. R. Co., 176 Fed., 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the court had been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff but also to ascertain and enter judgment for the damages so sustained. The Court held that this Commission alone could entertain a complaint of that nature. See also Morrisdale Coal Co. v. P. R. R. Co., 183 Fed. 929.

It will be seen therefore that with respect to the principle announced in Joynes v. P. R. R. Co., *supra*, there is a conflict of view as between the Commission and the very court to which these complainants, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these claims; and having found that undue discriminations had been practiced by the defendant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof.

The history of the complaints, the issues raised by the pleadings, and our course in dealing with them, are fully explained in our previous reports herein. Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C., 356; Jacoby & Co. v. P. R. R. Co., 19 I. C. C., 392; and Bulah Coal Co. v. P. R. R. Co., 20 I. C. C., 52. And therefore, in proceeding for the reasons explained to exercise jurisdiction to award

damages, no statement of the facts need be made. It will suffice to refer to our reports in the cases cited. The record has now been carefully studied with a view to arriving at the amount of damages which each of the complainants is shown to have sustained, and we shall briefly announce our conclusions:

Claim of the Hillsdale Company.

We find that as a result of the discriminatory acts of the defendant the Hillsdale Coal & Coke Company was damaged in the sum of $27,193.01, which it is entitled to recover, with interest from May 9, 1907.

The original claim was for $127,855.65, which upon re-argument was restated at $108,207.05, based on the assumption of a full car supply. A more conservative claim of $65,434.87 was also made in the brief on re-argument, based on an assumed output of 600 tons per day and what is claimed would have been a fair distribution of cars to this division of the defendant's lines and a fair share to these mines. Giving full weight to all that we find of record, however, we have been unable to find any clear basis for awarding this sum. Nor is there sufficient proof to enable us in this claim to make any finding with respect to the damages alleged to have been sustained by reason of the excess cost of mining the coal actually shipped to interstate destinations resulting from the irregular and inefficient working of the mine due to the failure of the defendant to furnish a regular and adequate supply of cars.

In arriving at our conclusion we have divided the time into two periods, the first from October 1, 1903, to March 31, 1906, after which the mines in this district were closed down for several months as the result of a strike; and the second from August 1, 1906, to May 1, 1907. We find the following facts established by the complainant's proof, and have used them as factors in calculating the damages:

(*a*) That the complainant's mines, known as Hillsdale

Nos. 2 and 3, during each of the two periods could have produced and disposed of an average of 500 tons of coal per working day; and that 22 working days would have been an average working month.

(*b*) That if the complainant had received its proper proportion of the cars available for distribution by the defendant it could have shipped and disposed of 143,880 tons during the first period and 67,795.20 during the second period; that it actually shipped during the two periods 45,059.84 tons and 35,719.25 tons, respectively, making a shortage in its output of 98,820.16 tons during the first period and 32,075.95 during the latter period; that of this tonnage 87,831.36 tons would have moved to points without the State of Pennsylvania during the earlier period and 15,662.68 during the latter period. In other words, we find that the quantity of coal which the complainant was prevented from selling and shipping to interstate destinations as the result of the discrimination against it in the matter of car supply was 87,831.36 tons and 15,662.68 tons for the periods named.

(*c*) That the average selling price for the coal at the mine for interstate markets would have been $1.0711 per ton during the first period and $1.1320 during the second period; that the cost of production during the same periods with its proper proportion of cars would have been 81 cents and 86 cents per ton, respectively; and that the profit lost on the shipments and sales which the complainant was prevented by the discriminatory acts in question from making during the first period was 26.11 cents per ton and during the second period 27.2 cents.

We have attached no importance to the fact, but for a better understanding of the situation it may be well to state, that this complainant has recovered of the defendant a judgment in the sum of $17,500 in an action in the State courts similar to this proceeding, but relating only to intrastate traffic. Hillsdale Coal & Coke Co. v. P. R. R. Co., 229 Pa., 61; 78 Atl., 28.

CLAIM OF JACOBY & COMPANY.

We find that by reason of the discriminations ascertained and set forth in our report in Jacoby v. P. R. R. Co., 19 I. C. C., 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record from which we find:

(*a*) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

(*b*) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

(*c*) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

(*d*) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

(*e*) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049

per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

We further find that the complainants in the sale of their mine realized a profit of $7,500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded.

Claim of Clark Brothers Company.

The discrimination practiced by the defendant against Clark Brothers Coal Mining Company is set forth in Jacoby v. P. R. R. Co., 19 I. C. C., 392. We now find that the damages sustained by this claimant as the result thereof amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.

The amount of its claim as stated in the original petition was $36,401.12. Our findings of fact, on which we arrive at this conclusion, are as follows:

(*a*) That the mines known as Falcon Nos. 2, 3, and 4 had an average output capacity of 600 tons, 120 tons, and 275 tons per working day, respectively, for the period of the action; and that 20 working days would have been an average working month.

(*b*) That dividing the time in question into two periods, one prior to March 31, 1906, and the other from August 1, 1906, to May 1, 1907, as we have done in the Hillsdale case, *supra*, the complainant could have disposed of and shipped 38,537.40 tons from Falcon No. 2 during the first period and 74,498.40 tons during the second period; that it actually shipped from that mine 11,812.76 tons and

21,326.18 tons in the respective periods, making a shortage in the output of 26,724.64 tons during the first period and 53,172.22 tons during the second period; and that of this tonnage it would have shipped and sold at interstate destinations 19,086.73 tons during the first period, and 35,109.61 tons during the second period.

(*c*) That from Falcon No. 3 the complainant could have shipped and sold 7,707.48 tons during the first period and 14,899.68 during the second period, if it had received its proper share of equipment; that it actually shipped from this mine during those periods 1,184.66 tons and 3,018.90 tons, respectively, making its output 6,522.82 tons during the first period and 11,880.78 during the second period less than it would have been with the proper car supply; and that of the figures last mentioned it would have shipped to points without the State of Pennsylvania 3,866.72 tons and 6,423.93 tons in the respective periods.

(*d*) That with its proper proportion of cars the mine known as Falcon No. 4 could have produced, sold, and shipped during the first period 12,210 tons and during the second period 34,145.10 tons, whereas it actually was able to ship but 2,306.12 tons and 11,105.45 tons; that it therefore shipped 9,903.88 tons during the first period and during the second period 23,039.65 tons less than it would have sold and shipped with its proper proportion of the cars; and that of this shortage 9,184.85 tons represents what would have been interstate business during the first period, and 8,497.02 tons during the second period.

(*e*) That the average selling price of the coal mined at Falcon No. 2 during the first period was $1.289 per ton and during the second period $1.25 per ton; that the cost of production at that mine, based on a fair car supply, would have been 92 cents per ton and 96 cents per ton during the respective periods; that the average selling price of the coal from Falcon No. 3 was $1.20 during both periods

and the cost of production 92 cents and 96 cents during the two periods; that the average selling price at Falcon No. 4 was $1.07 per ton during the first period and $1.132 per ton during the second period, and that the cost of production at that mine was 82 cents per ton and 86 cents per ton during the respective periods. The profit that would have accrued on the output of the respective mines was therefore as follows: Falcon No. 2, 36.9 cents and 29 cents; Falcon No. 3, 28 cents and 24 cents; and Falcon No. 4, 25 cents and 27.2 cents per ton. This measures the loss on the tonnage which the complainants were unable to ship.

(*f*) That the actual cost of production is shown by the record as $1.1419 per ton during the first period and $1.2063 per ton during the second period at Falcon No. 2; that the actual cost at Falcon No. 3 was $1.166 per ton during the first period and $1.311 per ton during the second period; that the actual cost at Falcon No. 4 was $1.017 and 90 cents during the respective periods; and that the excess over the cost of production, as shown in the preceding paragraph herein, resulting from the irregular car supply, was 22.19 and 24.63 cents per ton, respectively, at Falcon No. 2; 24.6 and 35.1 at Falcon No. 3; and 19.7 and 4 cents for the respective periods at Falcon No. 4. This is the measure we have used in arriving at the loss sustained by these complainants in increased cost of producing the coal actually sold and shipped to interstate points during the period in question.

Claim of Bulah Coal Company.

Following our conclusion in Bulah Coal Co. v. P. R. R. Co., 20 I. C. C., 52, that the defendant had unlawfully discriminated against these complainants, we now assess the damages resulting therefrom at $50,307.05, with interest from June 28, 1907.

The reparation prayed for by the complainants aggre-

gates $155,401.59. In our previous report wo took April 12, 1904, as the date for dividing the period of the action. Upon further reflection October 1, 1904, seems more proper, that being the date of the formation of the new copartnership. In arriving at the foregoing amount of reparation we have therefore considered the matter in two periods, one prior and the other subsequent to that date, and make the following findings:

(*a*) That the fair rating of the mine, fixed by the defendant without objection by the complainants, was 560 tons during both of the periods referred to.

(*b*) That 22 working days would in this case have been an average working month, although it is alleged that the mine could have been worked 26 days per month.

(*c*) That if the complainants had received their proper proportion of the cars available for distribution they could have mined, sold and shipped 120,415.68 tons during the first period and 214,257.12 tons during the second period; that they actually shipped during the two periods 110,892 and 143,000 tons respectively, making a shortage in their output of 9,523.68 tons in the first period and 71,257.12 tons for the second period; and that of this tonnage 3,878.04 tons during the first period and 48,540.34 tons during the second period would have moved to and have been sold at interstate destinations.

(*d*) That the average profit on orders received by the complainants for points without the State of Pennsylvania, and which were canceled and unfilled as the result of lack of their fair proportion of available equipment, would have been 71.8 cents per ton during the first period and 25.2 cents per ton during the latter period. This measures the complainants' loss on the coal which they were unable to ship during the period of the action, and the damages allowed on this ground aggregate $15,016.60.

(e) That the cost of production at the complainants' mines during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a non-discriminatory share of the car supply had been received; and that the excess in the actual cost of production of the coal mined and shipped to interstate destination resulting from the discrimination in car supply was therefore 35 cents per ton during the first period and 20 cents during the second period. This is the measure of the complainants' damages in the excess cost of production on the coal actually sold and shipped to points outside the State of Pennsylvania during the period of the action; and the damages awarded on that ground aggregates $35,290.45.

In cases of this kind there is a natural tendency on one side to enlarge and on the other to minimize the claim made. This is characteristic of the record before us. Damages are claimed by the petitioners to an extent not supported by the evidence adduced; on the other hand, the defendant has not sought so much to help the Commission to arrive at a correct award as to show the fallacious character of the factors adapted by the complainants in arriving at their estimates of their damages. The result is a record that is not so helpful as it might be. The responsibility for this, however, rests with the parties; in such a case we can accept only the responsibility that follows upon a careful study of the record and an earnest effort to weigh all the evidence before us and to reach such conclusions as it fairly justifies.

Many theories as to the elements that should be considered in estimating damages in a case of this kind were advanced by each side. It is said by the complainants that their damages should be estimated on the basis of a supply of coal cars according to the physical capacity of their mines, or at

least on the basis of their rated capacity. We have dealt with the claims only on the basis of the fair proportion of the available equipment that each claimant was entitled to receive in view of what we here find would have been a proper rating for each operation. According to the argument and brief on behalf of the defendant there is no sound theory upon which the damages of the complainants may be calculated. The defendant contends in all these cases that the coal which the complainants were unable to mine because of their failure to obtain their fair share of cars still remained in the ground, and that the extent of the damage really suffered can not therefore be ascertained without proof, showing that the coal when subsequently mined was sold at a less profit than might have been realized during the period of the action. We are not prepared to enter upon a discussion of that question. Such claims are clearly justifiable, and we know of no better guide or basis for our action than the rule followed by the courts in similar cases. In the action by the Hillsdale Coal & Coke Company in the State courts, to which reference has heretofore been made, the Supreme Court of Pensylvania, in 229 Pa. 261; 78 Atl., 28, said

> As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from that mine. * * * Counsel for appellant argued that because, as a result of the defendant's discrimination, the coal of the plaintiff was left in the ground, and might be available for future shipment, and as there was no evidence that prices which pervailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there

was no room for the inference that the plaintiff would realize for his coal when it might be shipped in the future less than it would have realized if shipped during the period of the action. But the burden was upon the defendant to show anything of this kind, by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose.

We do not undertake to say whether this is a correct rule, but simply refer to the case in explanation of our findings.

Orders will be entered in accordance with these conclusions.

SUPPLEMENTAL ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of March, A. D. 1912.

No. 1063.

HILLSDALE COAL & COKE COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19, I. C. C., 356, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, Hillsdale Coal & Coke Company, on or before the 1st day of

June, 1912, the sum of $27,193.01, with interest thereon at the rate of 6 per cent. per annum from May 9, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY
v.
THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, Clark Brothers Coal Mining Company, on or before the 1st day of June, 1912, the sum of $31,127.96, with interest thereon at the rate of 6 per cent. per annum from June 25, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,
v.
THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date

hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $31,715.57, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $18,591.48, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

By the Commission.

JOHN H. MARBLE,
Secretary.

(Seal)

"EXHIBIT B."

Opinion No. 1384.

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,
v.
PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY
v.
SAME.

Decided March 7, 1910.

REPORT OF THE COMMISSION.

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

Submitted January 30, 1909. Decided March 7, 1910.

1. The special allotment daily of 500 of its system coal cars to a particular operator for the purpose of supplying foreign steamships with coal found to be a discriminatory practice so long as they were not counted against the rating of those mines during periods of car shortage. A like view expressed of the sale by the defendant of 1,000 of its coal cars to the same operator.

2. Following Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, p. 356, defendant's rules and regulations for the distribution of coal cars during periods of car shortage found to be unlawful.

Harry Boulton, John H. Minds, William A. Glasgow Jr., and John William Hallahan, 3rd, for W. F. Jacoby & Company.

David L. Krebs for Clark Brothers Coal Mining Company.

Francis I. Gowen and *George V. Massey* for defendant.

REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

The mines of the complainant in Hillsdale Coal & Coke Co. v. P. R. R. Co., just disposed of (ante, p. 356), are located near the town of Glen Campbell, in Indiana County, in the State of Pennsylvania, on the Cush Creek branch of that part of the defendant's Cambria and Clearfield Division which extends northward from Cresson; and the chief competitor of that complainant has been D. E. Williams & Company, whose mines are in that district. In the above-entitled complaints the mines are in another mining district in the bituminous coal regions of Pennsylvania and on another part of the Cambria and Clearfield division of the defendant. They are located about nine miles west of Osceola Mills, in or near the town of Smoke Run, in Clearfield County, on what is known as the defendant's Moshannon branch, which, at Osceola Mills, joins its so-called Tyrone division extending northward from its junction with the main line at Tyrone. Since October, 1905, the Clark Brothers Coal & Mining Company has operated, under leases, three mines known as Falcon No. 2, No. 3, and No. 4. The largest and best equipped of these mines known, Falcon No. 2, was operated prior to that time by the petitioner, W. F. Jacoby & Company, which had taken over the lease of the mine in April, 1904.

It is Falcon No. 2, and the period from April, 1904, to October, 1905, that are involved in the first of the above-entitled complaints. That mine is said to be one of the best equipped collieries in the district, and on April 1, 1904, had an inventory valuation of $30,000. It is provided with an underground electric system for hauling its mine cars and with a first class wooden tipple and a patent dump; it is also well supplied with mine cars and has ample switch-track facilities; and its grades favor the out movement of loaded mine cars. There are said to be from 175 to 200 acres of

solid coal in the three Falcon mines, varying in thickness from 2½ to 5 feet; and in No. 2 mine there were, in 1904, about 100 acres of coal remaining, some 30 acres having been mined prior to that time. The coal is accepted as a superior grade of steaming coal that is readily marketed in New England, New Jersey, New York and Pennsylvania, being shipped all rail over the defendant's lines of those points and also to tidewater.

It is not contended that there was any unfairness in the rating assigned to Falcon No. 2 during the period from April, 1904, to October, 1905, when it was being operated by the complainant, W. F. Jacoby & Company. The rating then given to it was 450 tons a day, and this the complainant in that case admits was a close approximation of its actual output capacity. It appears, however, that from October, 1905, to May, 1907, when Falcon No. 2 was being operated by the Clark Brothers Coal & Mining Company the rated capacity credited to the three Falcon mines was 9 cars or 315 tons for No. 2, 1 car or 35 net tons for No. 3, and 2 cars or 70 net tons for No. 4, making a total capacity of 12 cars or 420 tons for the three mines. In April, 1907, these ratings were increased to 13 cars or 455 tons for Falcon No. 2, 2 cars or 70 tons for Falcon No. 3, and 5 cars or 175 tons for Falcon No. 4, making an aggregate capacity assigned to the three mines of 20 cars or 700 tons daily. The complainant in the second of these complaints, in support of the theory, advanced also in the Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, that commercial capacity ought to be eliminated, calls attention to the fact that the defendant in its answer admits that during the period in question the actual physical capacity of the three Falcon mines was 709 tons, 144 tons, and 270 tons, respectively, or a total of 1,133 tons in all, which would require 31.1 cars daily to move. On the other hand it is to be noted that the petitioner in the second complaint contends that the physical capacity of

the three mines was only 600 tons, 125 tons, and 300 tons, respectively, or 1,025 tons in the aggregate per day. Finally it must be observed that neither of the petitioners made complaint to the defendant, at that time, of the ratings of these mines, and when finally they did complain the defendant accepted their engineer's statement or estimate as to their actual working capacity. Under these circumstances, we see no substantial basis for any finding of discrimination against the complainants with respect to the defendant's ratings of their mines.

The damages sought to be recovered in the first of these complaints amount to $51,950.49 and in the second complaint to $36,901.13. Falcon No. 2 was purchased from the Penn Collieries Company, in which W. F. Jacoby seems to have been interested. The transaction appears of record as a purchase, but it may have been a mere change of ownership on the basis of nominal values. Nevertheless, the record shows a purchase price of $25,000 and that W. F. Jacoby & Company retained the mine until October, 1905, when they sold it for $32,500, or for $7,500 more than they paid for it. In the meantime they had mined 55,000 tons of coal and sold it apparently at a profit of about 30 cents a ton. Whether the mine could have been sold so well if more coal had been taken out of it by the complainant is a question as to which it is difficult to arrive at any satisfactory conclusion. It is to be noted, however, that the complainant claims to have had actual orders for a substantial portion of the output capacity of Falcon No. 2.

As we understand these cases, the substantial points upon which discrimination may be predicated are as follows:

There are a number of mines on the Moshannon branch of the defendant that are owned by other operators, but in this connection it will suffice to mention only the six mines operated by or for the Berwind-White Coal Mining Com-

pany, one of which, known as Eureka No. 27, immediately adjoins the complainant's Falcon No. 2. The same "D" coal vein is worked in these two mines. The quality of the coal is therefore the same and it is claimed that the capacities of the two mines were substantially the same at the period involved in the first of these two complaints. Falcon No. 2 is said in fact to have been better equipped, and if this was the case it would seem to have had an advantage over its neighbor if it had been placed on an equal footing in the matter of car supply.

But neither Falcon No. 2 nor the mines of the complainant, the Clark Brothers Coal & Mining Company, was placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal-car equipment during the period of the actions.

During the years 1902, 1903 and 1904 the employes of the defendant that were in charge of the distribution of coal-car equipment had special orders for giving to the Berwind-White Coal Mining Company a special allotment of 500 cars daily. That company had contracts for supplying coal for certain steamships sailing from New York Harbor. Complaint had been made that these steamers were frequently delayed because of a lack of coal, and the defendant felt that it was warranted in making that special arrangement with the coal mines that had undertaken to supply them with fuel. This preference was the occasion of comment by the Commission in its report in the coal and oil investigation. Few, if any, of these specially assigned cars reached the Berwind-White mines in this particular mining district, and therefore it is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing company's operations in another district; nevertheless, it was inequitable in principle and undoubtedly so to some extent at least in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must

be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district.

Another point also mentioned in our report in the coal and oil investigation just referred to is that 1,000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind-White Company. The defendant to that extent diminished its capacity to supply the coal-car requirements of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors.

It is established with reasonable clearness on the record that the Berwind-White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars in large numbers and were therefore kept in operation almost continuously while the complainants received an inadequate supply and were not able, therefore, to run their mines to the best advantage. This difference is largely explained by the fact that the Berwind-White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connection with coal. Under the rules of defendant, fully explained in Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, the ownership of such private cars and the enjoyment of these contracts resulted in the special allotment to the mines of that company of these so-called assigned cars. For the reasons explained at some length in that case those rules operated as an undue discrimination against these complainants, and we so find. But for the present and for

the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby.

An order will be entered in accordance with these conclusions.

ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of March, A. D. 1910.

Present:

Martin A. Knapp,
Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
} *Commissioners.*

No. 1139.

W. F. JACOBY AND ISAAC C. WEBER, TRADING AS W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

These cases being at issue upon complaints and answers

on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated and is in violation of the third section of the Act to Regulate Commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required, on or before the 1st day of November, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises.

ORDER OF COURT.
Filed July 19, 1912.

Before McPherson, *J.*

AND NOW, July 19th, 1912, the petition of W. F. JACOBY and ISAAC C. WEBER, co-partners, trading under the firm name of W. F. JACOBY & COMPANY, in the above proceeding having been filed and the averments thereof considered, it is ordered that the PENNSYLVANIA RAILROAD COMPANY be and are hereby directed and ruled to file a plea, answer or demurrer to said petition within thirty days of the service of a copy of said petition together with a copy of this Order, or judgment sec leg.

BY THE COURT,
Attest: Henry B. Robb,
Deputy Clerk.

DEMURRER OF DEFENDANT TO PETITION OF THE PETITIONERS.
Filed Sept 18, 1912.

The Pennsylvania Railroad Company, the defendant in the above entitled action, by protestation, not confessing or acknowledging all or any of the matters or things in the said petition contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said petition, and for causes of demurrer shows:

1. That it appears from the petition itself that the petitioners are not entitled to maintain the action.

2. That it appears from the petition that the action or proceeding has been brought to recover the amount of a certain award made in favor of the petitioners and against

the defendant by the Interstate Commerce Commission, which said award the said Commission was without authority to make, because the authority conferred by the Acts of Congress creating the said Commission and defining its powers and jurisdiction does not extend to nor include the making of awards of the character of that which forms the basis of the present action, nor has the said Commission been empowered by said Acts of Congress to entertain claims for damages of the character asserted by the petitioners in the proceeding instituted by them before the Commission which eventuated in the making of the said award.

Wherefore, and for divers other good causes of demurrer appearing on the said petition, this defendant doth demur thereto. And it prays the judgment of this Honorable Court, whether it shall be compelled to make any answer to the said petition; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

JOHN G. JOHNSON,
Solicitor and Counsel for Defendant, The Pennsylvania Railroad Company.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

JOHN G. JOHNSON,
Of Counsel for Defendant, The Pennsylvania Railroad Company.

Philadelphia, September 18, 1912.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA. } *ss.*

Lewis Neilson, being duly sworn, depdoses and says: I am Secretary of the Pennsylvania Railroad Company, the

above named defendant. The foregoing demurrer is not interposed for delay.

LEWIS NEILSON.

Sworn to before me this 18th day of September, 1912.

HENRY E. CAIN,
(SEAL) *Notary Public.*

Commission expires February 21, 1915.

OPINION.

Filed Nov. 12, 1912.

SUR DEMURRER TO PLAINTIFF'S PETITION.

THOMPSON, *J.*

This suit was brought to recover damages from the Pennsylvania Railroad Company which the plaintiffs claim to have suffered by reason of unjust and unlawful discrimination against the plaintiffs practiced by the defendant in violation of the Act to Regulate Commerce in the distribution of coal cars in the Clearfield coal region of Pennsylvania, in which the coal mines owned and operated by the plaintiffs were situated.

The petition sets out the facts upon which the plaintiffs' claim of unlawful discrimination is based. It further sets out that in June, 1907, the plaintiffs filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices of the defendant in violation of the Act to Regulate Commerce, and praying for a hearing and an order awarding the plaintiffs reparation in damages. It recites that, after answer and joinder of issue, the cause was heard and argued by all the parties and that a report was duly filed in which the Interstate Commerce Commission found that the rules, reg-

ulations and practices of the defendant of which the plaintiffs complained unduly discriminated against them, and that the Commission thereupon on March 11, 1912, made an order of reparation against the defendant in the sum of Twenty-one thousand, ninety-four dollars and thirty-nine cents ($21,094.39), with interest at the rate of six per cent. per annum from June 28, 1907. The suit is brought to recover the principal and interest awarded amounting to Twenty-seven thousand, three hundred and thirty-two dollars and fifty-five cents ($27,332.55), with interest from June 1, 1912, "as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission dated March 11th, 1912".

The defendant demurs upon the ground that the action is brought to recover the amount of an award which the Commission was without authority to make, because the authority conferred by the Acts of Congress does not extend to nor include the making of awards of the character of that which forms the basis of the action and because the Commission has not been empowered to entertain claims for damages of the character asserted by the plaintiffs in the proceeding instituted by them before the Commission.

In the case of Morrisdale Coal Co. v. Pennsylvania Railroad Co., 176 Fed. Rep. 748, where a suit was brought in this district to recover damages for alleged unlawful discrimination in distribution of coal cars in violation of the Interstate Commerce Act, the plaintiff had not prior to bringing suit filed a complaint with the Interstate Commerce Commission and obtained a ruling of the Commission finding the alleged discriminatory practice unlawful nor obtained an order from the Commission for reparation. There was a trial by jury and a return of a special verdict. The defendant moved to dismiss the suit upon the ground that the Circuit Court was without primary jurisdiction to entertain the action. The

question was whether, in a suit to recover damages for an alleged unlawful discrimination in which the question of rates was not involved, a previous application to the Interstate Commerce Commission for relief under Section 13 of the Act to Regulate Commerce was a prerequisite to maintaining an action in court, the Supreme Court having held in the case of Texas and Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S. 426, that a shipper seeking reparation predicated upon the unreasonableness of an established rate must primarily invoke redress through the Interstate Commerce Commission, which body alone it was declared is vested with power originally to entertain proceedings for the alteration of an established schedule. The motion to dismiss for want of jurisdiction was granted by Judge McPherson under the authority of the decisions of the Supreme Court in the cases of Texas and Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S. 426; Baltimore & Ohio Railroad Company v. United States ex rel. Pitcairn Coal Company, 215 U. S. 481; Interstate Commerce Commission v. Illinois Central Railroad Company, 215 U. S. 452.

The judgment of the Circuit Court was affirmed by the Circuit Court of Appeals, Morrisdale Coal Co. v. Pennsylvania Railroad Co., 183 Fed. 929.

In the case at bar it is conceded by the defendant that, in order to maintain the present action, it was necessary for the plaintiffs to first complain to the Interstate Commerce Commission and obtain a ruling of that body upon the lawfulness or unlawfulness of the alleged discriminatory practice, but it is contended that the Commission, having passed upon the practice, exhausted its authority and under the Act had no power to make an award of damages in a case like this where the order of reparation involves a finding which is not the result of a mere calculation as is the case in a cause of action arising from alleged discrimination in rates. It was

argued by counsel for the defendant that in the Morrisdale case the question of the Commission's primary jurisdiction to make an award of reparation was not decided by Judge McPherson. The position of the defendant is thus stated in counsel's brief:

> "It will be manifest, however, from a reading of the whole opinion that Judge McPherson considered solely the question of the right of the Courts to entertain actions for damages in the absence of the Commission's primary consideration and condemnation of the carrier's regulations, and that the question whether the Commission's primary jurisdiction extended beyond the consideration of the questions which were involved in reaching a decision as to whether or not the carrier's regulations were discriminatory was really not considered nor passed upon by him at all. True it is that he did speak of this jurisdiction. He did say that in his opinion the Commission 'has the primary jurisdiction to award reparation', but it is clear that he was speaking of the jurisdiction of the Commission generally to entertain complaints of the character which was involved in the action pending before him, and had not in mind the question whether the Commission's jurisdiction was confined to the administrative features of the Interstate Commerce Act or went further and included the performance of the judicial functions involved in considering and passing upon claims for damages of the character which the Morrisdale Coal Company was endeavoring to recover."

The Circuit Court of Appeals in its decision refrained from determining the question of the jurisdiction of the Commission to award damages because that question was not raised in the briefs nor in the record and was not necessary for the determination of the case after the one jurisdictional question,

that of the necessity of the Commission passing upon the discriminatory nature of the practice of the carrier, was determined. Judge Lanning said, however, in his opinion:

> "As already suggested, the letter of the statute seems to confer upon the Commission the power to assess damages in every case of discriminatory practices. Its procedure in making the assessment constitutes no part of a judicial proceeding. In a court of law its finding and order are but *prima facie* evidence of the damages sustained."

and Judge McPherson in his opinion in the Circuit Court said:

> "In a word, and without repeating the language of the Supreme Court that seems to me to justify the conclusion, I hold that the Commission has the primary jurisdiction to award reparation for such damages as may have been caused by a preferential practice in distributing coal cars in case of shortage; and that the circuit court has not the primary power to award such damages, even although they may have been caused by a practice that did not prevail at the time when the suit was brought."

The case at bar was one of a group of cases considered together by the Interstate Commerce Commission of which the case of Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company, 19 I. C. C. Rep. 356, was one. The action of the Commission in that case is referred to in Judge Lanning's opinion in the Circuit Court of Appeals in the Morrisdale Coal Company case in the following language:

> "It has therefore been held by a majority of the Commission in Hillsdale Coal & Coke Co. v. Pennsylvania R. R. Co., decided March 7, 1910,

that it has no authority or power to assess and determine the measure of damages in such a case as the one now before us. The view of the majority of the commission was that the only damages it may assess are rate damages, or damages that can be measured by the difference in the rate actually charged and the rate which, for any reason under the act, ought to be charged. The same view had been previously expressed by a majority of the commission in Joynes v. Pennsylvania R. R. Co., 17 Interst. Com. R. 361. 'As to whether we may go beyond the transportation question, the alleged discriminatory rules and practices', said the majority through Mr. Commissioner Harlan, 'and enter upon an inquiry as to the amount of the damage that may have been suffered by the complainant, the commission is divided, as in the case to which we have just alluded (the Joynes Case). The majority is still of the opinion that it is not for us under the law to assess and determine the measure of the damages thus sustained by the complainant; that being a judicial question for the courts.' Inasmuch, however, as the case now before this court had been decided by the Circuit Court before the Hillsdale Coal & Coke Company's Case was decided by the Commission, it concluded to hear argument on the question of damages to the end that, if the commission should award damages, the question of its power so to do might ultimately come before the courts for their consideration."

In the supplemental report of the Commission of March 11, 1912, which was subsequent to the decision of the Circuit Court of Appeals in the Morrisdale case, Commissioner Harlan stated the position of the Commission in the following language:

"In Joynes *v.* P. R. R. Co., 17 I. C. C., 361, it

was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Commission was not authorized under the act to award damages of that character. The general principle announced was that money demands of that nature, arising out of discriminations ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts and that our jurisdiction extends to what is there referred to as rate damages as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they were still under consideration and after our conclusions in *Joynes v. P. R. R. Co., supra*, had been announced, the Circuit Court of the United States for the Eastern District of Pennsylvania, in Morrisdale Coal Co. *v.* P. R. R. Co., 176 Fed., 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the court had been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff but also to ascertain and enter judgment

for the damages so sustained. The court held that this Commission alone could entertain a complaint of that nature. See also Morrisdale Coal Co. *v.* P. R. R. Co., 183 Fed., 929.

It will be seen therefore that with respect to the principle announced in Joynes *v.* P. R. R. Co., *supra*, there is a conflict of view as between the Commission and the very court to which these complainants, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these claims; and having found that undue discriminations had been practiced by the defendant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof."

I find nowhere in the Act language creating a distinction in the power of the Commission to award damages between cases arising from unlawful rates and those arising from unlawful regulations or practices.

Section 8 imposes liability upon the common carrier for damages sustained by any person injured by any act of the carrier prohibited or declared to be unlawful in the Act.

By Section 9 of the Act it is provided that any person claiming to be damaged by any common carrier subject to the Act can either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of damages in a district or circuit court of the United States, "but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which

one of the two methods of procedure herein provided for he or they will adopt."

Section 13 gives the Commission jurisdiction upon complaints "of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof," and provides that the carrier shall be relieved of liability to the complainant if it shall make reparation for the injury alleged to have been done, and in case of a failure to satisfy the complaint, provides for investigation by the Commission.

In the case of an investigation, it is by Section 14 made the duty of the Commission to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises and in case damages are awarded such report shall include the findings of fact on which the award is made.

Under Section 15, the Commission, if it is of opinion that any rates or charges or any regulations or practices are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, is authorized to determine what will be the just and reasonable rates or charges and what regulation or practice is just, fair and reasonable, and to make orders that the carrier cease and desist from such violation to the extent to which the Commission finds the same to exist. The section further provides "All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, * * * as shall be prescribed in the order of the Commission."

Section 16 provides:

> "That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to

> the complainant the sum to which he is entitled on or before a day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

As held by the Supreme Court in the Abilene Cotton Oil Company case:—

> "Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the Commission."

and in construing the effect of the 9th Section of the Act, Mr. Justice White in his opinion announced the following conclusion:

> "We think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of."

The Circuit Court of Appeals in the Morrisdale Coal Company case, in discussing the conclusions of the Supreme Court in the Abilene Oil Company case as to the effect of Sections 9 and 22 of the Act held

> "We conclude, therefore, that if, except for the act to regulate commerce, the Morrisdale Coal Company would have had a common-law right of action against the Pennsylvania Railroad Company for the damages here claimed, that right was not merely suspended while the old rule of distribution was in operation, but was taken away for all time and the coal company given a substituted right of procedure before the commission, at any time within one year after June 29, 1906, for a determination by the commission of the question whether the rule complained of was discriminatory, unless, indeed, the commission has no power, under the act, to determine whether a rule for the distribution of cars is discriminatory."

In Judge Lanning's opinion, after reviewing the decisions of the Supreme Court in the cases of the Texas & Pacific Ry. Co. v. Abilene Cotton Oil Company, the Baltimore & Ohio Railroad Co. v. Pitcairn Coal Company, and the Interstate Commerce Commission v. Illinois Central R. R. Co., it was held:

"These cases conclusively establish the doctrine that the Interstate Commerce Commission alone has original jurisdiction to determine whether an existing rate schedule, or an existing regulation or practice affecting rates, or an existing regulation or practice of any other kind affecting matters sought to be regulated by the act, is unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, and that the courts cannot, by mandamus, injunction, or otherwise, control or modify any order of the commission made by it in the due performance of its merely administrative functions. Of course, there may be cases involving constitutional or legal rights in which judicial questions for the determination of the courts may be presented. It is also the established doctrine that, where the subject-matter of the complaint is an alleged unreasonable or prejudicial rate charge, the commission has the power, after determining that the charge was excessive, to award damages to the complainant. In such case the award would probably be a mere matter of calculation, and would be a sum equal to the difference between the charge found to be reasonable and the charge actually made by the carrier. In a case where the alleged discriminatory rule has relation to the distribution of coal cars, it is obvious that, if the commission sustains the complaint and prescribes what shall thereafter be a reasonable rule of distribution, an award of damages to the complainant for injuries sustained under the operation of the discriminatory rule cannot be a mere matter of calculation."

After stating the position of the Interstate Commerce Commission, which is recited above, Judge Lanning continued:

"As already suggested, the letter of the statute seems to confer upon the commission the power to

it must be assumed that the procedure which was intended to apply to one class of cases was intended to apply to both. The argument on behalf of the defendant as against the power of the Commission to make an award of damages in cases arising from discriminatory regulations and practices, I think must be regarded as only an argument of inconvenience which assails the wisdom of the legislation or its efficiency, which are matters for Congress and not for this court to determine. This view of the matter is, I think, reinforced by the provision of Section 16 making the findings and order of the Commission, *prima facie* evidence of the facts therein stated. Under the decisions, the courts cannot by mandamus, injunction or otherwise control or modify any order of the Commission made by it in the due performance of its merely administrative functions. The sole question before the courts in passing upon the validity of an administrative order of the Interstate Commerce Commission is whether it had power to make the order and not the mere expediency or wisdom of having made it. This being the case, what purpose could Congress have had in providing that on the trial of a suit to recover an award by the Interstate Commerce Commission of damages, the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, if the findings and order are to relate solely to the question whether or not the regulations and practices complained of were discriminatory? If the findings and order as to that question alone are merely *prima facie* evidence of the facts therein stated then the carrier would be permitted to rebut the *prima facie* effect of the findings and order and to introduce evidence which had not been introduced before the Commission, which would result in a trial by a court and jury of the very questions as to which the Supreme Court has held that the findings and order of the Commission are final. The conclusion seems to be inevitable that in making the findings and order of the Commission *prima facie* evidence only, it was in-

tended by Congress that the findings and order should include what must ultimately be decided by a court and jury in case the carrier does not comply with the order for the payment of money, that is to say, the amount of the damages which the plaintiff has sustained. Congress having established a method of procedure and a rule of evidence governing actions under the statute, without indicating a different procedure to be followed in cases involving a discriminatory practice from that to be followed in cases involving unjust or unreasonable rates, I am of the opinion that the Interstate Commerce Commission had authority not only to pass upon the lawful or unlawful nature of the practice in this case, but also to make an order for reparation in damages, and that the present suit is properly based upon the award by the Interstate Commerce Commission.

The demurrer is therefore overruled.

STIPULATION.

Filed Aug. 17, 1912.

It is hereby stipulated and agreed between counsel for the parties in the above entitled cause that defendant may file its plea, answer or demurrer to the petition filed in the above cause at any time on or before September 18th, 1912, and that meanwhile the case shall be set down upon the trial list for the October Term of the District Court, subject to such plea as may be filed prior to or on September 18th, 1912, and without prejudice to defendant's right to answer or demur on or before, but not after said date.

WM. A. GLASGOW, JR.,
Attorney for Plaintiff.
JOHN G. JOHNSON,
Attorney pro Defendant.
per Carlyle H. Ross.

PLEA.

Filed Nov. 16, 1912.

Defendant in the above pleads "Not Guilty."

JOHN G. JOHNSON,
Attorney for said Defendant.

Nov. 16, 1912.

JURY.

And afterwards, to wit, on the third day of March, 1913, a jury being called comes to wit:

George H. Yeager	N. F. Hoffman
John K. Loughlin	R. A. Keely
Rupert Yerkes	Thomas P. Lowrey
Jacob W. Brennerman	Harry S. Schultz
C. P. Martindale	August Boitney
William M. Capp	Martin Graver

who are respectively sworn or affirmed to well and truly try the issue joined.

VERDICT.

And afterwards, to wit, on the 4th day of March, 1913, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages in the sum of Twenty-eight Thousand Five Hundred and Seventy-two and 54-100 ($28,572.54) Dollars.

BILL OF EXCEPTIONS.

Filed Apr. 8, 1913.

Be it remembered, that in the said term of June, 1912, came the said plaintiff into the said Court, and impleaded the said defendant in a certain plea of trespass, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said Court, held at the County aforesaid before the Honorable J. Whitaker Thompson, Judge of the said Court, the third day of March, 1913, the aforesaid issue between the said parties came to be tried by a jury of the said County for that purpose duly impaneled (prout list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue, being also called came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said defendant did except to the rulings of the Court as herein appears.

Before Hon. J. Whitaker Thompson, *J.*, and a Jury.

Philadelphia, Monday, March 3rd, 1913.

Present:

William A. Glasgow, Jr., Esq., and
John H. Hall, Esq., representing the plaintiffs.
John G. Johnson, Esq., and
Francis I. Gowen, Esq., representing the defendant.

Transcript of Testimony, Rulings of the Court, Charge of the Court, and Exceptions.

Jury sworn or affirmed March 3rd, 1913.

Mr. Glasgow opened the case to the jury on behalf of the plaintiffs.

Mr. Glasgow read the petition to the jury.

Mr. Gowen opened the case to the jury on behalf of the defendant.

PLAINTIFF'S EVIDENCE.

WILLIAM F. JACOBY, having been duly sworn, was examined and testified as follows:

By MR. GLASGOW:

Q. Who composes the firm or did compose the firm in 1904 and 1905 of W. F. Jacoby and Company?

A. Mr. I. C. Weber and myself.

Q. Was your firm engaged in mining coal at that time?

A. Yes, sir.

Q. Where?

A. At Smoke Run, Clearfield County, Pennsylvania.

Q. What is the name of your mine?

A. Falcon No. 2.

Q. Are you the same W. F. Jacoby and is Mr. Weber the same Isaac C. Weber, composing the firm of Jacoby and Company who made a complaint before the Interstate Commerce Commission?

A. Yes, sir.

Q. During the period from April 1st, 1904, to October 18th, 1905, covered by that complaint, will you tell the jury whether or not you made demand daily for cars for the ship-

ment of coal from the Falcon No. 2 mine?

A. We did.

Q. Daily demand?

A. Yes, sir.

Q. Did you receive the cars which you demanded for the shipment of your coal?

A. No, we did not.

Q. You say you are the same W. F. Jacoby that made the complaint before the Interstate Commerce Commission in the case of W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby and Company, against The Pennsylvania Railroad Company, No. 1139?

A. Yes, sir.

MR. GLASGOW: I offer in evidence the report of the Commission in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company against the Pennsylvania Railroad Company, No. 1139, decided March 7th, 1910, together with the order of the Commission in the same case entered on the 7th day of March, 1910.

MR. GOWEN: We object to offering any single part of the record. We are entirely willing to have the whole record go in.

MR. GLASGOW: What do you mean by "record"?

MR. GOWEN: The record and the testimony.

MR. GLASGOW: The Act to Regulate Commerce does not permit the offering of the whole record.

MR. GOWEN: We object to the admission of the report and the order in evidence, because it is but a part of the record in the case, and is not, therefore, admissible as the record before the Commission; and also because it embodies conclusions of law, arguments and other matters extraneous from, entirely disassociated from, findings of fact, and by the Inter-

state Commerce Act the findings of fact of the Commission are alone made *prima facie* evidence.

THE COURT: You say you object because it is not the record before the Commission. What do you mean by that—the evidence?

MR. GOWEN: Yes, sir. The whole record.

THE COURT: I will overrule the objection, and grant the defendant an exception.

(Exception noted for defendant, by direction of the Court.)

MR. GLASGOW: I will read the report of the Commission to the jury, in the case of W. F. Jacoby and Company against The Pennsylvania Railroad Company. Of course, I will ask your Honor in the charge to call the jury's attention to the fact that they are not to consider arguments or mere repetition of theories, but that the matter of fact found here is the discrimination.

Mr. Glasgow proceeded to read the report of the Commission, as follows:

"REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

The mines of the complainant in Hillsdale Coal & Coke Co. v. P. R. R. Co., just disposed of (ante p. 356), are located near the town of Glen Campbell, in Indiana County, in the State of Pennsylvania, on the Cush Creek branch of that part of the defendant's Cambria and Clearfield division which extends northward from Cresson; and the chief competitor of that complainant has been D. E. Williams & Company, whose mines are in that district."

MR. GOWEN: I object to that part being read, Mr. Glasgow knows that it is not proper to read that.

MR. GLASGOW: I do not know that an introductory statement in order to make what the Commission is going to find intelligible, is improper to read.

THE COURT: If that is the report in the case, of course you may read it.

MR. GLASGOW: Mr. Gowen objects to the first part, and I will leave out the first paragraph and read beginning with the second paragraph to the jury.

Mr. Glasgow read the report of the Commisison, beginning with the second paragraph, as follows:

"It is Falcon No. 2, and the period from April, 1904, to October, 1905, that are involved in the first of the above-entitled complaints. That mine is said to be one of the best equipped collieries in the district, and on April 1, 1904, had an inventory valuation of $30,000. It is provided with an underground electric system for hauling its mine cars and with a first class wooden tipple and a patent dump; it is also well supplied with mine cars and has ample switch-track facilities; and its grades favor the out movement of loaded mine cars. There are said to be from 175 to 200 acres of solid coal in the three Falcon mines, varying in thickness from 2½ to 5 feet; and in No. 2 mine there were, in 1904, about 100 acres of coal remaining, some 30 acres having been mined prior to that time. The coal is accepted as superior grade of steaming coal that is readily marketed in New England, New Jersey, New York and Pennsylvania, being shipped all rail over the defendant's lines to those points and also to tidewater.

It is not contended that there was any unfairness in the rating assigned to Falcon No. 2 during the period from April, 1904, to October, 1905, when it was being operated by the complainant W. F. Jacoby & Company. The rating then given to it was 450 tons a day, and this the com-

plainant in that case admits was a close approximation of its actual output capacity. It appears, however, that from October, 1905, to May 1907, when Falcon No. 2 was being operated by the Clark Brothers Coal & Mining Company the rated capacity credited to the three Falcon mines was 9 cars or 315 tons for No. 2, 1 car or 35 net tons for No. 3, and 2 cars or 70 net tons for No. 4, making a total capacity of 12 cars or 420 tons for the three mines. In April, 1907, these ratings were increased to 13 cars or 455 tons for Falcon No. 2, 2 cars or 70 tons for Falcon No. 3, and 5 cars or 175 tons for Falcon No. 4, making an aggregate capacity assigned to the three mines of 20 cars or 700 tons daily. The complainant in the second of these complaints, in support of the theory, advanced also in the Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, that commercial capacity ought to be eliminated, calls attention to the facts that the defendant in its answer admits that during the period in question the actual physical capacity of the three Falcon mines was 709 tons, 144 tons and 270 tons, respectively, or a total of 1,133 tons in all, which would require 31.1 cars daily to move. On the other hand it is to be noted that the petitioner in the second complaint contends that the physical capacity of the three mines was only 600 tons, 125 tons and 300 tons, respectively, or 1,025 tons in the aggregate per day. Finally it must be observed that neither of the petitioners made complaint to the defendant, at that time, of the ratings, of these mines, and when finally they did complain the defendant accepted their engineer's statement or estimate as to their actual working capacity. Under these circumstances, we see no substantial basis for any finding of discrimination against the complainants with respect to the defendant's ratings of their mines.

The damages sought to be recovered in the first of these complaints amount to $51,950.49 and in the second com-

plaint to $36,901.13. Falcon No. 2 was purchased from the Penn Collieries Company, in which W. F. Jacoby seemed to have been interested. The transaction appears of record as a purchase, but it may have been a mere change of ownership on the basis of nominal values. Nevertheless, the record shows a purchase price of $25,000 and that W. F. Jacoby & Company retained the mine until October, 1905, when they sold it for $32,500, or for $7,500 more than they paid for it. In the meantime they had mined 55,000 tons of coal and sold it apparently at a profit of about 30 cents a ton. Whether the mine could have been sold so well if more coal had been taken out of it by the complainant is a question as to which it is difficult to arrive at any satisfactory conclusion. It is to be noted however, that the complainant claims to have had actual orders for a substantial portion of the output capacity of Falcon No. 2.

As we understand these cases, the substantial points upon which discrimination may be predicated are as follows:

There are a number of mines on the Moshannon branch of the defendant that are owned by other operators, but in this connection it will suffice to mention only the six mines operated by or for the Berwind-White Coal Mining Co., one of which, known as Eureka No. 27, immediately adjoins the complainant's Falcon No. 2. The same "D" coal vein is worked in these two mines. The quality of the coal is therefore the same and it is claimed that the capacities of the two mines were substantially the same at the period involved in the first two of these complaints. Falcon No. 2 is said in fact to have been better equipped, and if this was the case it would seem to have had an advantage over its neighbor if it had been placed on an equal footing in the matter of car supply."

MR. GLASCOW: I will read the next paragraph this way.

Mr. Glascow continued reading the report of the Commission, changing the next succeeding paragraph to the one last read to read as follows:

"But Falcon No. 2 was not placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal-car equipment during the period of this action.

During the years 1902, 1903, and 1904, the employes of the defendant that were in charge of the distribution of coal-car equipment had special orders for giving to the Berwind-White Coal Mining Company a special allotment of 500 cars daily. That company had contracts for supplying coal for certain steamships sailing from New York Harbor. Complaint had been made that these steamers were frequently delayed because of a lack of coal, and the defendant felt that it was warranted in making that special arrangement with the coal mines that had undertaken to supply them with fuel. This preference was the occasion of comment by the Commission in its report in the coal and oil investigation. Few, if any, of these specially assigned cars reached the Berwind-White mines in this particular mining district, and therefore it is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing company's operations in another district; nevertheless it was inequitable in principle and undoubtedly so to some extent at least in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district.

Another point also mentioned in our report in the coal and oil investigation just referred to is that 1,000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind-White Company.

The defendant to that extent diminished its capacity to supply the coal-car requirements of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors.

It is established with reasonable clearness on the record that the Berwind-White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars, in large numbers, and were therefore kept in operation almost continuously while the complainants received an inadequate supply and were not able, therefore, to run their mines to the best advantage. This difference is largely explained by the fact that the Berwind-White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connection with coal. Under the rules of defendant, fully explained in Hillsdale Coal & Coke Co. v. P. R. R. Co., ante, the ownership of such private cars and the enjoyment of these contracts resulted in the special allotment to the mines of that company of these so-called assigned cars. For the reasons explained at some length in that case those rules operated as an undue discrimination against these complainants, and we so find. But for the present and for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby.

An order will be entered in accordance with these conclusions."

MR. GLASGOW: The order is as follows, in the same case, and also referring to the case of Clark Brothers Coal Mining Company vs. Pennsylvania Railroad Company, No. 1111:

"These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its line for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as 'assigned cars,' from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation and practice of the defendant in that behalf unduly discriminated against the complainants and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required, on or before the 1st day November, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

MR. GLASGOW: I offer in evidence the supplemental report of the Commission in the case of W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, against the Pennsylvania Railroad Company, No. 1139, by Harlan, Commissioner, so much of the report as appears on pages 190 and 191, under the heading, "Claim of Jacoby & Company."

Mr. GOWEN: We object to the report relating to the claim of Jacoby & Company going in as a whole, upon the ground that it does not embody simply findings of fact.

THE COURT: I will admit the report insofar as it deals with Jacoby & Company, and grant the defendant an exception.

(Exception noted for defendant, by direction of the Court.)

Mr. Glasgow read the portion of the report referring to the claim of Jacoby & Company, as follows:

"We find that by reason of the discriminations ascertained and set forth in our report in Jacoby v. P. R. R. Co., 19 L. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record from which we find:

(a) That the fair rating of the mine for the time in question as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

(b) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

(c) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

(d) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

(e) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

We further find that the complainants in the sale of their mine realized a profit of $7500 over the purchase price which they had paid. But we do not undertake to say whether or

not this amount or any part of it should be deducted from the amount of the reparation here awarded."

MR. GLASGOW: We offer in evidence the order entered by the Interstate Commerce Commission on March 11th, 1912, in the case of Jacoby & Company against the Pennsylvania Railroad Company, No. 1139.

MR. GOWEN: We object to that, because the order does not contain any findings of fact, and it is, therefore, not admissible.

THE COURT: I will overrule the objection, and grant the defendant an exception.

(Exception noted for defendant, by direction of the Court.)

Mr. Glasgow read supplemental order referring to the case of W. F. Jacoby & Company vs. The Pennsylvania Railroad Company, as follows:

"This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 L. C. C., 392, and all the findings and conclusions in said reports are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Co., on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon, at the rate of 6% per annum from June 20th, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has

been found by this Commission to have been unlawful and unjust as more fully and at large appears in and by said reports of the Commission.

By Mr. Glasgow:

Q. Mr. Jacoby, has any part of that award of the Commission been paid to you or to Mr. Weber, or to the firm?

A. No, sir.

(No cross-examination.)

Mr. Glasgow: As I understood, Mr. Gowen has kindly avoided the necessity of bringing anybody here to prove these reports and orders, and that it is agreed by counsel for the defendant that the report and the supplemental report and the two orders that I have read in the record were duly served upon the defendant, the Pennsylvania Railroad Company.

Mr. Gowen: Yes. That is admitted.

Mr. Glasgow: With that admission, we close the case for the plaintiffs.

Plaintiffs Rest.

DEFENDANT'S EVIDENCE.

Mr. Gowen: We offer in evidence the Act of Assembly of the Legislature of Pennsylvania approved April 13th, 1846, entitled, "An Act to Incorporate the Pennsylvania Railroad Company", and call special attention to the provisions of Section 21 thereof.

Mr. Glasgow: I object to that, because an act of that kind regulating the duties of a carrier has no

relevancy whatever since the passage of the Act to Regulate Commerce on the 4th of February, 1887.

THE COURT: What is the purpose of offering that?

MR. GOWEN: It is offered for the purpose of showing the character of the obligation imposed upon the defendant by the Legislature of Pennsylvania in the charter granted to it, in respect to the transportation of cars of shippers.

MR. GLASGOW: I object to it on the ground that that can can have no bearing upon the question in this case, since the passage of the Act to Regulate Commerce. I have no desire to prevent it going in, provided it goes in under my objection and exception.

THE COURT: Do I understand you merely make a pro forma objection?

MR. GLASGOW: I will not make any objection to it.

Mr. Gowen read Section 21 of the Act referred to, as follows:

Public Highway.

"Section 21. That upon the completion of said railroad, or any part thereof, the same shall be esteemed a public highway for the conveyance of passengers and the transportation of freight, subject to such rules and regulations in relation to the same, and to the size and construction of wheels, cars and carriages, the weight of loads, and all other matters and things connected with the use of said railroad, as the president and directors may prescribe and direct; Provided that the said company shall have the exclusive control of

Proviso

the motive power, and may from time to time establish, demand and receive, such rates of toll or other compensation, for the use of the said road, and of said motive power, and for the conveyance of passengers, the transportation of merchandise and commodities, and the cars or other vehicles containing the same, or otherwise, passing over or on said railroad, as to the president and directors shall seem reasonable: Provided, however, nevertheless, That said rates of toll and motive power charges, so as to be established, demanded or received, when the cars used for such conveyance or transportation are owned or furnished by others, shall not exceed two and a half cents per mile for each passenger; three cents per mile for each ton or two thousand pounds of freight; three cents per mile for each passenger or baggage car, and two cents per mile for each burden or freight car, every four wheels being computed a car; and in the transportation of passengers, no charge shall be made to exceed three cents per mile for through passengers, and three and a half cents per mile for way passengers."

Proviso.

Tolls

FRANK C. STRATTON, having been duly sworn, was examined and testified as follows:

By MR. GOWEN:

Q. Where do you reside?

A. Washington, D. C.

Q. You are connected with the Interstate Commerce Commision?

A. Yes, sir.

Q. In what capacity?

A. Docket clerk.

Q. Have you the record before the Commission in the case of W. F. Jacoby & Company against the Pennsylvania Railroad Company, No. 1139?

A. I have.

Q. The record you have is that which is on file with the Commission?

A. Yes, sir.

MR. GOWEN: I offer in evidence the testimony and all of the exhibits appearing in the record of the case before the Commission in the matter of the claim of W. F. Jacoby & Company against the Pennsylvania Railroad Company, No. 1139, produced by the witness.

MR. GLASGOW: Do you offer the briefs?

MR. GOWEN: No. Just the testimony and the exhibits.

MR. GLASGOW: There is some correspondence here. What about that?

MR. GOWEN: I am just offering the testimony and the exhibits.

MR. GLASGOW: I think if you are going to offer any part of it you had better offer it all, and I will agree that it all shall go in.

MR. GOWEN: Our offer is confined to the testimony and the exhibits.

MR. GLASGOW: Then, I object to it. If you will put in all of it, I will not put in any objection.

MR. GOWEN: If your Honor pleases, I think the question can be resolved by a decision of the Supreme Court of the United States in the case of the Interstate Commerce Commission vs. The Louisville and Nashville Railroad Company, which has been rendered in the last few weeks, in 137 U. S.

(Mr. Gowen cited case referred to.)

MR. GOWEN: We offer the testimony before the Commission for the purpose of showing that under the evidence presented, the Commission's finding as to the extent to which the plaintiffs had been discriminated against was not justified by the testimony before it, but that, on the contrary, it was directly in opposition to that testimony, not conflicting testimony, but was in opposition to the only testimony on the subject of the distribution which has been made by the defendant in the region in which the plaintiffs' mine was located.

MR. GLASGOW: Of course, if your Honor please, there never was a controversy that if the Commission did not have any evidence before them, that that might be done. The Commission could not act without evidence. But when Mr. Gowen comes to offer this record, to have this jury pass upon the question of whether the Commission was right on the evidence before them, there is plenty of authority for the proposition that you cannot do anything of that kind. The jury cannot re-try the case on this evidence. This evidence, as far as the conclusions of the Commission goes, is *prima facie* right. The jury is not to review this evidence. If Mr. Gowen will offer the record as it stands, I make no objection.

By MR. GLASGOW:

Q. You have presented here a book numbered 1139, and inside of it are a number of papers. Are there contained within the two backs of this book the entire record before the Commission in this case?

A. I think so, yes. The entire record is contained, with the exception of the oral argument. That was consolidated with another case.

Q. Is there anything in here that is not part of the record in the case, so far as you know?

A. No, sir.

By Mr. Gowen:

Q. There is a great deal of correspondence there, is there not, which is not part of the record?

A. Not part of the record proper. We treat it as part of our record, for our own purposes.

By Mr. Glasgow:

Q. Everything else is part of the record?

A. Everything else is part of the record.

The Court: Mr. Gowen, as I understand it this is offered not for the purpose of showing that the Commission was wrong in finding that the rule was discriminatory, or that the practice was discriminatory, but for the purpose of showing that the Commission was wrong in the amount of damages that it assessed? Is that right?

Mr. Gowen: That there was no testimony before the Commission upon which to predicate the finding which they have made as to the amount of damages.

The Court: As to the amount of damages?

Mr. Gowen: Yes, sir.

The Court: You are confining it to that in offering it?

Mr. Gowen: Yes, sir.

Mr. Glasgow: I object to the introduction of the parts of the record that Mr. Gowen has suggested. I object, first, on the ground that if he offers anything of the record, he must offer all of it; and I further object, on the ground that after the case has been submitted to the Commission upon the evidence which is adduced before it, that the findings of the Commission as to what they think that evidence shows is *prima facie* evidence, and that in order for the defendant to defeat the

recovery it must go and adduce other evidence in defence. In other words, that the jury is not an appellate tribunal to pass upon whether the Commission has properly construed the facts that are set forth in the record.

THE COURT: The exception is sustained, and I will grant an exception to the defendant.

(Exception noted for defendant, by direction of the Court.)

EDMUND C. HALEY, having been duly sworn, was examined and testified as follows:

By MR. GOWEN:

Q. You are employed by the Pennsylvania Railroad Company?

A. Yes, sir.

Q. What position do you hold?

A. I am a clerk in the office of the General Superintendent of Transportation.

Q. What are those papers that you have before you?

A. These are what we call the coal car distribution sheets, showing the records of the cars placed at the mines on the Tyrone Division of the Pennsylvania Railroad.

Q. Between what periods?

A. Covering the period from April 1st, 1904, to October 18th, 1905.

Q. Are those the sheets which were examined by the plaintiffs or their representatives?

A. Yes, sir.

Q. And which were produced before the examiner of the Interstate Commerce Commission?

A. Yes, sir.

(No cross-examination.)

MR. GOWEN: We offer in evidence these sheets produced by the witness, with the understanding that they shall not be written into the record, but that they shall be made the subject of reference for any purpose that either party wants. We have made up certain statements from them, and the other side has certain statements to submit.

MR. GLASGOW: If I knew what kind of statement he is making up from that record, I could probably agree that the sheets should be here for us without being put in evidence. It is perfectly absurd to talk about putting those sheets in evidence and to have anybody know what is in them.

Mr. GOWEN: Suppose we just consider that offer as made, and proceed with the testimony, until we come to that point.

THE COURT: Very well.

JAMES F. CLENNON, having been duly sworn, was examined and testified as follows:

By MR. GOWEN:

Q. Where do you reside?

A. Brooklyn, New York.

Q. What business are you at present engaged in?

A. I am manager of the Sackett & Wilhelms Company, lithographing and printing.

Q. Were you at any time connected with the Audit Company of New York?

A. I was, yes.

Q. What is that company? What business is it engaged in?

A. Public examinations and investigations.

Q. Of accounts?

A. Accounts and everything; engineering, and appraisals.

Q. Were you connected with the Audit Company of New York in 1906?

A. I was.

Q. At that time did you make an examination or did you have charge or supervision of an examination that was made of the distribution sheets of the defendant, showing the distribution of cars made in the Tyrone region?

A. I did.

Q. Was the purpose of that examination in order to ascertain the number of cars of the various classes which had been placed by the Pennsylvania Railroad Company during a series of years at the mines in the Tyrone region?

A. It was.

Q. Did that series of years include April 1st, 1904, to October 18th, 1905?

A. Yes, sir.

Q. Were the results that were reached from the examination of the distribution sheets embodied in any book or document?

A. They were.

Q. Does the book before you show those results?

A. This shows a summary of the distribution for the Tyrone Division.

Q. Month by month, is it, or how?

A. It is by years and by months, and by mines. There is a statement by years, a statement for a period of years, and a statement of months, of the various mines in the Tyrone Division.

Q. Will you refer to the month of April, 1904?

By Mr. Glasgow:

Q. Did you make up that paper that you have?

A. I was in charge of the work on it; yes, sir.

Q. I did not ask you that. I asked you did you make it up?

A. I have not seen the sheet bill. I could not tell you.

Q. How do you know that you were in charge of it, then?
A. I know I had the Tyrone Division.
Q. Look at it and tell me.
A. No, sir. I did not make up the sheet. (After referring to another sheet.)
Q. Who did?
A. Cramer and Lee.
Q. Who are they?
A. They were two employes at the time.
Q. Employes of whom?
A. Of the Audit Company of New York.

By Mr. Gowen:

Q. Take the month of April, 1904. Does that book show the number of cars of the various classes placed at each mine in the Tyrone Region in that month?

Mr. Glasgow: I object to that, unless this gentleman made it up. Then he could testify to what it shows.

By Mr. Glasgow:

Q. You did not make that up, as I understand?
A. No.

Mr. Gowen: It is the commonest thing in the world, for those who have had the supervision of any work which has been done under their direction, work of this character, to simply prove what was done. I suppose it would be impossible to go back through a series of men who compiled all the data under Mr. Clennon's direction. It was finally embodied in that book.

By Mr. Glasgow:

Q. I did not understand you to say that these people, Cramer and Lee, worked under your supervision?
A. Oh, yes.
Q. What do you mean by that?
A. We had about 135 men on that work, and there were four of us in charge.

Q. What do you mean by "in charge"?

A. We had different divisions. I had the Tyrone and a couple of other divisions, and one of the other men had—

Q. You had the Tyrone Division?

A. Yes, sir.

Q. What do you mean by "you had it"?

A. I handled all the work on the Tyrone Division. I had the supervision or the looking after of the work in taking the independent results.

Q. What do you mean, that you told these men to go to the distribution sheets and get that information?

A. No. I gave them the distribution sheets and showed them how to work them up. I gave them all the instructions necessary to work them up, and supervised the work while it was going on.

Q. You never compared that work with the distribution sheets?

A. I would not say that in this case. I have in many cases.

Q. I am asking you about in this case.

A. I would not swear to that.

Q. So you do not know whether they got it accurately from the distribution sheets or not?

A. Oh, yes; I know that. I know they got the totals. I know in totals only.

Q. But you do not know whether the items on it were correct or not?

A. Well, I believe it to be so. It was checked and rechecked.

Q. I did not ask you that. I asked you, do you know? Did you do it?

A. No; I did not do it.

Q. You did not see whether they were doing it correctly or not? They know, but you don't?

A. They don't know any more than I do.

Q. Didn't they do it?

A. That would not make any difference.

Q. Why not?

A. Because I supervised the work and showed them how to do the work.

Q. Did you tell them to get that information from these distribution sheets that you see there?

A. Yes, sir.

Q. And they know they got it, don't they?

A. I know they got it.

Q. How do you know?

A. Because I supervised all the totals.

Q. Did you see—

A. I saw them jotting down the figures.

Q. But you said you did not compare them with the sheets?

A. Not in detail.

Q. How do you know, then?

A. I do not know, any more than the totals of the distribution sheets show.

Q. I am not talking about the totals of the distribution sheets. You don't know whether they were correct or not?

A. Yes, I do.

Q. How?

A. I found the totals here myself were taken from daily sheets, out of the mine summary, and the monthly summary, and if they were not taken care of they would have been out of balance before we got through.

Q. Do you mean to say you can balance up the distribution sheets of coal cars in the Tyrone Division like you can a set of books?

A. We did; yes, sir.

Q. You say you dealt entirely with the totals?

A. The totals.

Q. What I want you to explain is, if you dealt entirely with totals how you know whether the details there are correct?

A. From the mine detail sheets.

Q. You are judging that from the totals you know the details must be correct. Is that it?

A. That is not subject to a yes or no answer.

Q. Yes, it is.

A. I disagree with you.

Q. I can't help that. I am asking the question, and you are here to answer.

A. I won't answer it that way.

Q. You won't answer it?

A. No.

Q. I ask you, is it not because the totals meet with your approval that you then judge that the details are correct?

A. You will have to go further than that.

Q. What else is there that you judge from, that the details are correct?

A. On the proof of the sheets.

Q. What do you mean by the proof of the sheets?

A. Well, your mine sheets. You have got the detail by days for each month of all the mines in the division, and any division, and that was taken on a monthly summary.

Q. Who took it?

A. The employes that I had there and that account was taken on to a mine summary.

Q. Who took that?

A. That was also taken by the employes; and all those sheets as they were finished came up to me. I do not say that I examined every sheet in detail. I examined the most of them.

Q. Now, you just now said you could not tell whether you examined this or not?

A. No. There is no mark on it. I did not sign my name.

Q. If you do not know you better stick to it and say that you do not know about it.

A. I have not said that I did.

Q. You made the totals?

A. Yes.

Q. I am asking you, how do you know that the details there were correct?

A. From a further analysis of the mines, proving out there.

Q. Who analyzed it?

A. The men that were under me.

Q. How do you know they were right?

A. Because it was re-checked and counter-checked and I know they came to it.

Q. Who did it?

A. My men did.

Q. But you did not do the rechecking and counter-checking?

A. The final work I did.

Q. You just said that you did not know anything about the details.

A. I said the detail work. I said the final work I did.

Q. The totals you said you checked?

A. The final work.

Q. You said just now on the stand here that you never checked the details of that work?

A. Well, I have not changed it any. I said the final work I did.

Q. What do you mean by the final work?

A. The final summaries.

Q. The final conclusion?

A. Yes, sir.

Q. The totals?

A. The totals, by myself.

Q. Then, is it not your conclusion that the details are correct because you took the totals?

A. Sure.

Q. Is there any other reason that you have got for it?

A. The other reason is that they were all rechecked and counterchecked.

Q. But you did not do that. How could you tell?

A. In general practice, it would lead you to believe that four or five sets of men—

Q. You do not testify about general practice. I want to know what you know about it. Where are the totals?

A. These are the totals here. (Indicating on sheet.)

Q. What do you mean by that, the total number of cars in the region?

A. The distribution of the cars in the region. The total distribution gives you the cars in the region.

Q. This is a statement showing distribution of coal cars. What did you check on that?

A. I took these totals, the monthly totals.

Q. There is one line here headed, "Tyrone totals".

A. That is it.

Q. You say you took that? You say you checked that?

A. That is it.

Q. What do you mean by checking it?

A. I took the distribution sheets and I took the totals.

Q. You took the distribution sheets and you compared them with the totals here?

A. Yes, sir.

Q. And that shows that the totals on the distribution and the totals here correspond?

A. Yes, sir.

Q. But that did not enable you to tell whether the details of the several mines were accurately taken off, did it?

A. No; but that has been re-checked.

Q. As far as the proportions of the different classes of cars, or the proportions that went to the individual mines, you know nothing about it of your own knowledge, and never had anything to do with verifying it? That is correct, is it not?

A. Not in all instances, no. I could not even pick out an instance where I went into the details; it is too far back.

Q. All you can testify to is that you took the car distribution appearing on the different sheets and saw that they were the same as the totals on this memorandum?

A. Yes, sir; and proved that the mines entitled to the cars there showed that the totals were right.

MR. GLASGOW: I object to this gentleman testifying as to what is in that paper. I know the rule perfectly well, that a man under whose eye the work is done, and who sees that it is going on correctly and properly, can testify to it, but when I come to cross-examine this gentleman about what is on those sheets he absolutely protects himself by saying that he does not know. I want the men who made them up, and then I can get some information from them.

MR. GOWEN: It is manifest, of course, that the distribution sheets themselves, without some compilation made from them, would be absolutely useless and meaningless to anybody. Mr. Clennon, who had charge of this work which we have been referring to for the Audit Company of New York, which was making an examination of these sheets for the purpose of ascertaining what the distribution had been, has testified that all the compilations contained in that book were made under his supervision and direction; that he had charge of the work, and that the work itself was done by about 135 clerks; that he tested that work, and was satisfied of the correctness of the results.

THE COURT: What does this summary consist of, Mr. Gowen? It shows the monthly pro rata allotment, does it?

MR. GOWEN: Yes, sir. The distribution sheets themselves show all the mines, 120 or 130, and the number of cars placed for those mines of the various classes, individual, system and fuel, and so on, each

day in the month. Of course, it is absolutely impracticable for the jury, for any of us, to take these sheets and in the course of the trial work out whether the plaintiffs received their distributive share of cars.

THE COURT: As I understand it, this summary here covers the whole 128 mines that you refer to?

MR. GOWEN: Yes, sir; covers the distribution.

THE COURT: Are the sheets relating to this mine separate from the sheets relating to other mines?

MR. GOWEN: No, sir. They are all the same.

THE COURT: This summary that you have here, does that contain the distribution to this mine on separate sheets?

MR. GOWEN: No, sir. The twenty-five sheets show the distribution that was made for twenty-five days in the month, one taken for the daily reports. Those sheets show, I think, about 120 or 130 mines, and the daily distribution to those mines is shown on those sheets. The Audit Company of New York took those sheets or consolidated each month's sheets so as to show the monthly distribution made to each mine, including the plaintiff's.

THE COURT: So that the items on this summary relating to the plaintiffs' mine are all through that volume?

MR. GOWEN: They appear each month. Each month is stated separately.

THE COURT: In each month that mine is contained in the summary? Is that it?

MR. GOWEN: Yes, sir. Our contention will be that what the plaintiffs are entitled to is to be ascertained

in a certain way; that all the cars for distribution in this region were distributed in this region in which this mine was located, and they are entitled to only their share. Now, in order to find out what that share was, we have got to show, in the first place, the total ratings of the mines in that region, the total number of cars that were distributed, and it is for the purpose of showing that that we have produced these records, and we expect to follow that by proof—we do not have to follow it by proof of those records, because the plaintiffs have proven themselves the number of cars which they got, and that is a matter which we can prove through them.

THE COURT: I understand that, but the question here is as to whether the summary made up by the experts has been properly proved.

MR. GOWEN: I think, so far as the summary is concerned, that it is, because Mr. Clennon has said that these summaries were compared by him himself. It is the detail distribution at each mine, as to which he has been unable to say that those figures were examined and tested by him.

MR. GLASGOW: No. He says that all these figures in the body of that are made by these other two men. He took this line down here, the Tyrone total, and he saw whether that corresponded with the total as it appeared on those distribution sheets.

MR. GOWEN: That is right.

MR. GLASGOW: Now, as to the correctness of all of this in here, he does not know anything except the information which may have come to him from these other two men.

MR. GOWEN: No; I do not think Mr. Clennon said that. Mr. Clennon said that he had tested the totals that you have just referred to.

MR. GLASGOW: By comparing that with the totals on the distribution sheets.

MR. GOWEN: Yes, sir. That he could not say that in every month he had tested the details, but that he had done so in certain months, and had satisfied himself as to their correctness, but he could not say in each month it had been done.

MR. GLASGOW: My objection is that the totals are of no value here, as far as I can see; that the individual daily distribution to the mines, to the individual mines, is the only thing of value, and the men that can give it to us are the only men who know whether they are correct or not. We have done the same thing, and the statement was put in before the Interstate Commerce Commission and we have brought our men here who actually made it up from these sheets.

By THE COURT:

Q. What totals do you refer to when you say, "the totals"?

A. All the totals by days on the monthly summaries, and in a good many instances—

Q. The totals for each mine, do you mean?

A. It was not by mine. There is a total number of mines listed in these sheets, and each day there is a sheet, and we made this up from the daily sheets, and then we summarized this from the monthly sheets. So it simply comes to an adjustment of the summaries.

By MR. GLASGOW:

Q. Do you mean to say that this line of totals was checked by you by checking the distribution sheet off, say in April, 1904, and adding them up to see if they correspond with that?

A. Yes, sir.

Q. That is what you did?

A. Yes, sir; and, as I say, I went over in a great many instances and checked up the details on those sheets.

Q. But I understand you cannot say whether you did that on this or not?

A. Oh, no.

Q. But that is what you mean, that you took the distribution say for the first day in April, 1904, and saw that that distribution showed so much as a total, so many cars in that region?

A. So many of each class.

Q. So many cars of each class in that region, and then you took April 1st and April 2nd and April 3rd, and so on, to see whether the totals corresponded to that?

A. Yes, sir.

Q. But as to whether all of the work which was done on those details toward bringing them into a summary for the month, as to the number of hopper cars and the number of individual cars or the number of company coal cars or commercial cars, showing in each month what proportions of those cars were gotten by each mine, you do not know whether that is correct or not, except from the fact that somebody made it up and you sent them to make it up?

A. In a general way, yes.

THE COURT: What you are attempting to show is that there was a proper distribution, Mr. Gowen?

MR. GOWEN: Yes, sir.

THE COURT: I do not see that the fact that this witness knows that the totals corresponded on the original sheets with the totals on this sheet, that that would have any bearing on the question of the distribution. If he can testify that he verified the figures, the distribution at each mine, made up by these accountants working under him, I think the matter would be sufficiently proven, but I do not see that the fact that the total on the original sheets and the total on the summary corresponded would show

that the distribution in between was correct.

Mr. Gowen: We think that these sheets have been sufficiently identified to justify their admission, and ask, therefore, that these sheets may be put in evidence, that this compilation may be put in evidence for the purpose of showing the distribution made in that region as a whole, and the distribution made at each mine. If your Honor should be against us as to that latter feature, the distribution made to each mile, I want to say the distribution as a whole which was made in the region can be established, in view of Mr. Clennon's testimony, that was verified.

By Mr. Glasgow:

Q. Do the totals in those figures that you have there include the Snowshoe?

A. No, sir. The Snowshoe is separate.

Q. Why did you not put that in there?

A. It was not considered part of the Tyrone Division.

Q. Who did not consider it part?

A. The Pennsylvania Railroad.

Q. Don't you know the evidence in this case showed that it was?

A. Probably the evidence in the case was in after this work was done.

At 1:2 o'clock p. m., the Court took a recess until 2 o'clock p. m.

2 P. M.

Mr. Gowen: If your Honor please, Mr. Glasgow has agreed that the totals shown on this book of the Audit Company may go in evidence, and I do not care to press for the admission of the details, in view of the fact that there are objections to those. There

is an Exhibit which was put in evidence before the Interstate Commerce Commission which embodies the totals shown on those books, and if it is agreeable we will just put the Exhibit in.

Mr. Glasgow: It shows the totals with the Snowshoe Branch left out.

Mr. Gowen: Of course, we think that the Snowshoe Region has nothing to do with this, but we are perfectly willing to get the figures in.

Edmund C. Haley, recalled.

By Mr. Glasgow:

Q. Are those distribution sheets which you produced, the distribution sheets for the Tyrone Division?

A. Tyrone Division; yes, sir.

Q. Does it show on it the Moshannon Branch?

A. It is not designated separately.

Q. Do you know whether it does?

A. The mines on the Moshannon Branch are on there.

Q. Are the mines on the Snowshoe Branch on there?

A. Yes, sir; they are shown separately on the bottom.

Q. The heading of this is "Pennsylvania Railroad—the Pennsylvania Railroad Division. The following is the distribution of coal and coke cars on the Tyrone Division"; and these mines which are listed on that sheet in the first column are the mines on the Moshannon Branch, as well as other parts of the Tyrone Division, and also on the Snow Shoe Branch?

A. Yes.

Q. And on that sheet there is no particular designation of whether the mine which is listed is on the Moshannon Branch

or the Snow Shoe Branch, or any other branch of the Tyrone Division, is there?

A. No, sir.

Q. So that, as far as that sheet would go, it would show a distribution of cars to the whole Tyrone Division, embracing the mines on the Moshannon Branch and the Snow Shoe Branch, would it not?

A. Yes, sir.

Q. Is that the original distribution which was used at the time that the actual distribution of cars was made?

A. It is a carbon copy of it, I think.

Q. It could not be a carbon copy, made with a pen. Is not that some copy of some distribution sheet?

A. It is signed by the superintendent of the Tyrone Division.

Q. But that does not quite answer my question. The question is whether you know whether this is the original sheet which was prepared at the time the cars were distributed.

A. I could not answer that.

Q. You know that there were a number of different distribution sheets in existence, were there not?

A. There were supposed to be original sheets and carbons.

Q. That does not look like a carbon.

A. This is maybe the original.

Q. You do not know whether that is the original? It may have been a copy, or what purports to be a copy, made of the original?

A. I was not on the work at this time.

Q. I say, you do not know; it may have been.

(Not answered.)

Q. Do you not know that there were several sets of distribution sheets, covering the period we are speaking about, car distribution sheets, which did not agree with each other?

A. No, sir; I did not know that.

Q. Your attention was never called to that?

A. No, sir.

Q. Do you know whether that is the sheet which was furnished to Mr. Weber and Mr. Jacoby when they made up the statements for the hearing?

A. Yes, sir; this was the sheet.

Q. That is?

A. Yes, sir.

Re-direct-examination.

By Mr. Gowen:

Q. Mr. Glasgow asked you about the mines on the Snow Shoe Branch, as he called it. Are they shown on this sheet as separated from the mines in the Tyrone Region?

A. Yes, sir; they are.

Q. In the second column of this sheet the per cent. is shown, is it not, which the rating of each mine bears to the total of the region?

A. Yes, sir.

Q. There is a mine shown here as No. 150, which is styled "Barrett (United States Mining Company)" and that shows that that mine, does it not, was entitled to two-tenths of one per cent. of the region distribution?

A. It does, yes.

Q. Then below that there is a total of percentage, which is 100 per cent., is it not?

A. Yes.

Q. Then the mines which are in what has been referred to as the Snow Shoe Region, or as Mr. Glasgow said the Snow Shoe Branch, are shown, and how many are they in number?

A. Three.

Q. The ratings of those mines aggregate what?

A. 100 per cent.

Q. So that there are two 100 per cents. on that sheet?

A. Yes.

Re-cross-examination.

By Mr. Glasgow:

Q. If you would just leave out that first line of totals and add numbers 1, 2 and 3, which are on the Snow Shoe Branch, it would still leave 100 per cent., would it not?

A. You would have to reduce all your other percentages, because this is based on each mine's rating.

Q. Will you tell me, if the Snow Shoe is not in the Tyrone Division, where that paper shows, where is it? What division is it on?

A. It comes under the same superintendent.

Q. If it is not in the Tyrone Division, what division is it on? Can you tell me?

A. It comes under the same superintendent as the Tyrone Division.

Q. How many divisions are there?

A. Altogether?

Q. Eight, are there not?

A. Ten.

Q. On April 1, 1904, there were eight, were there not? Let me name them to you: There was the South Fork—I mean for car distribution—the South Fork, the East End of the Pittsburgh Division, which was called the East End, or Mountain Division; the West End of the Pittsburgh Division, the West Penn, the Monongahela, the Pennsylvania and Northwestern, the Allegheny, the Cambria and Clearfield, and the Tyrone. Those were the divisions, were they not, in 1904, on April 1st?

A. As far as I know, they were. I was not on the car distribution at that time. I am not familiar with that.

Q. There was no division on your road for car distribution that was called the Snow Shoe Division, was there?

A. We keep it separately for all purposes, yes.

Q. But you keep it under the general Division of Tyrone, do you not?

A. We put it on the Tyrone sheet.

Q. There was no division called the Snow Shoe Division?

A. No; it was not called Snow Shoe Division.

Q. And it was under the Tyrone Division superintendent?

A. Yes.

MR. GOWEN: We have agreed, if your Honor please, that the totals which are shown in that book, containing the compilations of the New York Audit Company, shall be put in evidence, and they are embodied in the Exhibit which was before the Commission and we will just ask that that be placed on the record.

MR. GLASGOW: This Exhibit, however, is accompanied by a statement from Mr. Gowen that he will have the Snow Shoe mines made up in the same form.

(For the totals referred to by Mr. Gowen, see testimony of Edmund C. Haley at page 121.)

R. B. FREEMAN, having been duly sworn, was examined as follows:

By MR. GOWEN:

Q. Where do you reside?

A. Tyrone, Pa.

Q. What position have you with the Pennsylvania Railroad Company?

A. Trainmaster of the Tyrone Division?

Q. Were you in that position in 1904 and 1905?

A. I was.

Q. Did your duties as trainmaster extend to the supervision of the distribution of the cars in the coal mines on the Tyrone Division?

A. Yes, sir.

Q. There were three mines—I do not know whether there were more than three mines, but there were three operations whose mines were located in what has been referred to as the Snow Shoe Region. Will you please state what relation existed between the Snow Shoe Region, or Snow Shoe Branch, whatever it was called, and the Tyrone Region as to car distribution?

A. The two regions were considered separate and distinct, so far as the car distribution was concerned.

Q. In other words, the distribution sheets which are before you show that the percentages of the mines in the Tyrone Region aggregate 100 per cent. and the mines in the Snow Shoe Region aggregate 100 per cent.?

A. Exactly.

Q. Respectively?

A. Yes, sir.

Q. How was it as to actually making distribution? Did you treat the mines as in separate regions or as in one region?

A. As separate regions.

Cross-examination.

By Mr. Glasgow:

Q. When you came to make distribution to the Tyrone Division, as compared with the other divisions of the road, how did you get at what proportion the Tyrone was entitled to and what the Snow Shoe was entitled to?

A. I had nothing to do with the distribution except as applied to the Tyrone Division.

Q. Then, after you got the cars to the Tyrone Division is when you came in; is that right?

A. Yes, sir.

Q. So you had nothing to do with the division of the cars as between the divisions?

A. Only as between the Snow Shoe—no, not as between divisions, no.

Q. Then whatever was coming to Snow Shoe and Tyrone were all distributed as between Divisions, to the Tyrone Division?

A. To the two regions; yes, sir.

Q. Was all distributed to the Tyrone and then you subdivided?

A. Yes, sir.

Q. Now then, after you got it to the Tyrone Division, you made a distribution to the three mines on the Snow Shoe Branch?

A. Yes, sir.

Q. And you made a distribution to the mines on the Moshannon Branch?

A. Yes, sir.

Q. And to the other parts of the Tyrone Division?

A. Yes; we called them two regions, Clearfield and Snow Shoe.

Q. How did you get what proportion was to go to the Snow Shoe branch?

A. They get their proportion in accordance with their ratings.

Q. They were rated just like all the other mines on the Tyrone Region?

A. If I recall correctly, the Snow Shoe Region was entitled to approximately ten per cent. of the cars.

Q. But you took all the mines on the Tyrone Division, including the Snow Shoe, and estimated what was the capacity of each mine, did you not?

A. Yes, sir.

Q. And the total capacity of each mine represented 100 per cent.?

A. Yes, sir; each district.

Q. Taking it altogether, it represented 100 per cent., did it not?

A. Each district represented 100 per cent., as I understand it.

Q. What I mean is, suppose you had 1,000 cars on the Tyrone Division and suppose the capacity, as you rated

the capacity of the three mines on the Snow Shoe Branch was 3,000 tons and the total capacity of the mines on the Tyrone Division was 9,000 tons, three times. How did you divide the cars as between the Snow Shoe Branch and the other parts of the Tyrone Division?

A. Approximately 10 per cent. to the Snow Shoe Region and the 90 per cent. to the Clearfield.

Q. That was on the basis that the Snow Shoe capacity was 10 per cent. of the others?

A. Yes.

Q. So that you did divide the cars that were assigned to the whole Tyrone Division, you then subdivided those cars upon a capacity basis between the Snow Shoe Branch and the rest of the Tyrone Division?

A. In order to make an equitable division of both regions in that district.

Q. You made the same kind of a division between the Moshannon Branch and the Tyrone Division, did you not?

A. No; everything except the Snow Shoe Region was considered one district.

Q. I know, but suppose you took the Moshannon Branch?

A. We did not separate the mines of the Moshannon District at all.

Q. Oh, no, you did not separate them, but suppose they showed 10 per cent. capacity. They would get their 10 per cent. of the car distribution?

A. Exactly.

Q. Suppose one mine showed 2 per cent. capacity. It would get 2 per cent. of the entire car distribution to the Tyrone Division, would it not?

A. Of the available cars, yes, sir.

Q. And Snow Shoe, showing 10 per cent., got 10 per cent. of the cars?

A. Yes, sir.

Q. So that while your division, as between the divisions, was to the Tyrone Division, after you got it there you made a separate division among the mines, treating the Snow Shoe Branch as all together; did you not?

A. Yes, sir.

Re-direct-examination.

By Mr. Gowen:

Q. Referring to the mines in the Snow Shoe Region, how many were there?

A. We only show three mines, whereas the mines of the Lehigh Valley Coal Company are grouped. They probably had at that time six or eight mines there, all shown under one heading as the Lehigh Valley operation.

Q. What percentage of the total Snow Shoe ratings was represented by the Lehigh Valley Coal Company mines?

A. About 66 per cent.

Q. About two-thirds?

A. Two-thirds, yes.

Q. Do you know what that coal was used for?

A. We considered it Lehigh Valley supply—

Q. Do you know what it was? Not what you considered it.

A. I know that it was all practically Lehigh Valley supply; fuel coal.

Q. Fuel coal of the Lehigh Valley Railroad Company, you mean?

A. Yes.

Q. Did the Lehigh Valley Railroad Company send in large numbers of its own cars?

A. Practically sufficient cars to fully supply their mines.

Q. Not at all times?

A. No; there were times when we furnished system cars. That would be during periods of depression when there were a number of system cars available.

Re-cross-examination.

By Mr. Glasgow:

Q. You mean by the Lehigh Valley Coal Company this Coal Company that was owned by the Lehigh Valley Railroad?

A. Yes, sir.

Q. And when those cars were sent in, the engines of the Pennsylvania Railroad Company took them when they came on their line, hauled them over the line with their locomotives, loaded them and then carried them back over the lines of the Pennsylvania Railroad?

A. Yes, sir.

Q. Do you not know that, for the year from April 1, 1904, to April 1, 1905, the Pennsylvania Railroad furnished, of its own cars, to the Lehigh Valley Railroad 4,271, and that 4,267 were Lehigh Valley cars?

A. I do not know that without looking at the sheet, but I do not question it at all. That occurred quite frequently.

Q. So you would not say that the Lehigh Valley Railroad Company furnished anything like the cars that were used by that Company?

A. On certain periods, no. When we had play for our own cars we were very glad to use them and save per diem charges on the Lehigh Valley Raliroad cars.

Q. That was the period when your shippers on the Pennsylvania were crying for cars?

A. I do not know about that.

Q. That is true from 1904 to 1905, during the period of this suit?

A. I am not so sure about that.

Q. Will you please explain, then, why it is from April 1, 1904, to April 1, 1905, if you did not have a demand, that everybody was crying for cars, why you did not furnish to Jacoby & Company what they wanted?

A. We gave them their proportion of the cars we had for distribution on the Tyrone Division.

Q. Exactly; after taking out the individual cars and all the foreign fuel cars and all the fuel cars of your own company, whatever was left you gave them their percentage of?

A. Yes.

Q. And the other cars you assigned to these other people that were sending coal out and never charged them against them at all; that is correct, is it not?

A. I believe it is. I am not sure about the period of 1904. It seems to me the cars were subject to allotment during that time.

Q. 1904?

A. I think they were.

Q. Did you ever have any rule charging individual or private cars, or foreign fuel cars, against the allotment of people that got them until January 1, 1906?

A. Yes; I think April, 1905.

Q. You think April, 1905?

A. I think so.

Q. Have you got any such rule that you could produce?

A. I think so. I am not quite positive, but I think I have. I did not understand your question.

Q. It is not a fact that during the period of this case, running up to October, 1905, the cars I have mentioned, individual cars, fuel cars and foreign fuel cars, were all assigned to the people who used them?

A. Yes, sir.

Q. Without charging them against the capacity of their mines?

A. I believe so.

EDMUND C. HALEY, recalled.

By MR. GOWEN:

Q. Based upon the totals ascertained by the Audit Company as the result of its examination of these sheets, what were the total ratings of the mines in the Tyrone Region,

excluding what we have been referring to as the Snow Shoe Region, in the year between April 1, 1904, and April 1, 1905?

A. 232,517.

Q. And the total numbers of the cars of all classes which were placed in the region?

A. 66,504.

Q. What was the percentage, therefore, of the aggregate ratings of the region?

A. 28.6.

MR. GLASGOW: You mean, what is the proportion of the tonnage of the cars that actually went in to the theoretical rating of the region?

MR. GOWEN: Yes,—the actual rating.

By MR. GOWEN:

Q. Coming to the period between April 1, 1905, and—we will have to take October 31, 1905, although the period in action ends October 15, 1905—what were the aggregate ratings of all the mines in the Tyrone Region?

A. 152,934.

Q. And what number of cars of all classes were placed?

A. 45,963.

Q. What percentage of the total ratings is that?

A. 30.1.

Cross-examination.

By MR. GLASGOW:

Q. That excludes the mines which are on the Snow Shoe Branch?

A. What you call the Snow Shoe Branch; yes, sir.

Q. And you are not able to say now what would be those percentages which you have given, if the Snow Shoe Branch was taken in?

A. No; I could not give you that.

Q. Could you tell us the total number of cars that were ordered during that period?

A. Not here; no, sir.

Q. Will not the sheet show it?

A. I would have to compile it.

Q. You cannot tell me, then, the total number of cars ordered?

A. No.

Q. In making up that estimate which you have of the tonnage which went into that field, you are counting one steel car as two wooden cars?

A. Yes, sir.

Q. As a matter of fact, the average of the wooden cars is about 30 tons, is it not?

A. It was considered at that time—you see it was 1904 and 1905—it was considered as 25 tons. A steel 50-ton car we count as two cars.

MR. GOWEN: In this connection, I would like to offer in evidence an Exhibit prepared by the plaintiff and put in evidence before the Interstate Commerce Commission, which was Exhibit No. 10. It comprises two sheets, entitled "Detail Statement showing discrimination in favor of other mines and against Falcon No. 2, from April 1, 1904, to April 1, 1905", the other sheet entitled "Detail Statement showing discrimination in favor of other mines and against Falcon No. 2, from April 1, 1905, to October 15, 1905."

APRIL 1, 1904, TO APRIL 1, 1905.

	Rated capacity based on 308 distribution dys. 32 tns. per car		Shipped based on 32 tns. per car			28% would be		Difference in excess of Falcon No. 2		
	Cars	Tons	Cars	Tons	Per cent.	Cars	Tons	In Cars	In Tons	In p. ct.
Falcon No. 2	4331	138600	1237	38874	28.0					
Electric	4812	154000	2801	89632	58.2	1347	43120	1454	46512	30.2
Lenore	1444	46200	879	67904	60.8	404	12936	475	15192	32.8
Leland No. 1	2888	92400	2122	28128	73.5	809	25872	1313	42032	45.5
White Oak	1323	42350	598	19136	45.2	370	11858	228	7278	17.2
Penn No. 3	2406	77000	1623	51936	67.4	673	21560	950	30376	39.4
Peerless #1, 2, 3	1450	46400	957	30624	68.2	406	12992	551	18632	40.2
Coaldale #11	3128	100100	1612	51584	51.5	876	28028	736	23556	23.5
Betz-Bucher	2566	82100	1244	39808	48.4	718	22988	526	16820	20.4
Corona	2366	75700	1026	32832	43.3	662	21196	364	11636	15.3
Standard No. 7	963	30800	856	27392	88.9	270	8624	586	18768	60.9
B. W. Co. (7 mines)	24260	776325	13452	430464	55.5	6793	217311	6659	213153	27.5
L. V. Coal Co.	12031	385000	8538	273216	70.9	3363	107800	5175	165416	42.9
		1908375	35708	1142656	59.9	16691	534285	19017	609371	

APRIL 1, 1905, TO OCTOBER 15, 1905.

	Rated capacity based on 167 distribution dys 32 tns. per car		Shipped based on 32 tns. per car		23.9%			Difference in excess of Falcon No. 2		
	Cars	Tons	Cars	Tons	Per cent.	would be Cars	Tons	In Cars	In Tons	In p. ct.
Falcon No. 2	2348	75150	541	17973	23.9					
Electric	2609	83500	1376	44032	52.7	624	19968	752	24064	28.8
Penn #5 and 6	1827	58450	1197	38304	65.5	437	20160	760	18144	41.6
Bucher	2088	66800	1398	44736	66.9	334	10688	1064	34048	43.0
Corona	1566	50100	640	20480	40.8	374	11968	266	8512	16.9
Fairmount #2	1305	41750	773	24736	59.2	312	9984	461	14752	35.3
Rabold	1044	33400	757	24224	72.5	250	8000	507	16224	48.6
Penn #3	1305	41750	725	23200	55.5	312	9984	413	13216	31.6
Coaldale #11	1827	58450	1018	32576	55.7	437	13984	581	18592	31.8
Weston	1305	41750	593	18976	45.4	312	9984	281	8992	21.5
Standard #7	522	16700	401	12832	76.8	125	4000	276	8832	52.9
B.W.&Co. 5 mines)	11481	367400	7154	228928	62.3	2744	87808	4410	141120	38.4
		860050	16032	513024	59.6	6261	206528	9771	306496	

Mr. Glasgow: The statement which Mr. Gowen offered, being the totals of distribution for the period covered, headed "Tyrone Region Rating and Cars Placed Therein", (referring to totals given by Edmund C. Haley in the above testimony) was defendant's Exhibit 2 in the hearing before the Interstate Commerce Commission.

Mr. Gowen: It is admitted for the purposes of the case that the distribution sheets for the Tyrone Region show about 150 mines embraced in the region and three mines of the Snow Shoe Branch or region.

William J. Jacoby, recalled for cross-examination.

By Mr. Gowen:

Q. I hand you the plaintiff's Exhibit No. 10 as used before the Interstate Commerce Commission, which has just been put in evidence, which is headed "Detail Statement showing discrimination in favor of other mines and against Falcon No. 2 from April 1, 1904, to April 1, 1905", and another from April 1, 1905, to October 15, 1905, there being two sheets, and ask you whether that was prepared by you or under your direction?

A. Jointly by Mr. Weber and I; yes, sir.

Q. And it was prepared by you after an examination made of the distribution sheets of the defendant, was it not?

A. Yes; made from the distribution sheets.

Q. Now in stating the number of cars which were placed at the mines, which are enumerated in that Exhibit, you included cars of all classes, did you not?

A. Yes, sir.

Q. That is, the individual and private cars, the fuel cars of the defendant and all other railroad companies, and the so-called system cars of the Pennsylvania Railroad Company?

A. All cars; yes, sir.

Q. Take the Berwind-White Coal Mining Company. For the first period how many cars do you show as having been delivered at the mines of that company?

A. 13,452 cars.

Q. Referring to another statement which I understand you also prepared and which I hand you, will you state how many of the 13,452 cars were system cars of the Pennsylvania Railroad?

A. 460.

Q. All the other cars which were delivered to the Berwind-White Coal Mining Company were either the private or individual cars of the company or were fuel cars of the defendant?

A. Yes, sir.

Q. Now coming to the second period, how many cars do you show in that exhibit as having been placed at the mines of the Berwind-White Coal Mining Company?

A. 7,154.

Q. Referring, then, to the statement which you have just referred to, will you please say how many of those cars were system cars of the Pennsylvania Railroad?

A. 60.

Q. All the balance of the 7,154 cars were then either the private or individual cars of the Berwind-White Coal Mining Company, or their fuel cars?

A. Yes, sir.

Q. You yourself made the selection, did you not, of the mines embraced in that statement?

A. Yes, we did. I took the most active mines in the region at that time and most active shippers.

Q. Did you not take the mines which showed the largest percentage of cars received?

A. The most active shippers—no, not necessarily. I took those that were the most active shippers.

Q. Necessarily does not that mean the most active shippers

were the men that had the most number of cars?

A. That shipped most regularly, yes. Some of those mines were idle or abandoned, not working for some reason or other and disabled, and therefore we took the most active shippers for comparison, because we were in shape to ship at all times.

Q. How many days were you in a position to ship during the first period, that is, between April 1, 1904, and April 1, 1905? Before answering this question, will you please look at the paper I hand you, which is Exhibit No. 5, which was put in evidence on your behalf in the proceedings before the Interstate Commerce Commission, and then say what that shows.

A. The actual days the mine was capable of producing its full daily capacity was 275.

By Mr. Glasgow:

Q. That is for the year ending March 31, 1905?

A. Yes, sir.

By Mr. Gowen:

Q. Was it not idle on all other days, due to holidays or to accidents at the mine which prevented its operation?

A. The other days it was idle was due to Sundays, legal and miners' holidays, accidents and delays caused by accidents to the mines.

Q. Now taking the second period from April 1, 1905, to October 15, 1905, how many days was the mine capable of working?

A. 138¼ days.

Q. And all other days it was prevented from working due to causes which you have just referred to as in the first period?

A. Yes.

Q. Now in that statement, coming again then into Exhibit No. 10, will you please state whether you estimated the greatest capacity of your mine on the basis of 275 days in the first period?

A. No, we used the number of days for which we had distribution sheets, which was 308 days. That applied to our mine, however, as well as to all the rest of them. That is simply a matter that did not have any bearing on the percentage one way or the other. The same percentages would have existed in reality as they do this way.

Q. Then, as the result of using 308 days instead of 275, you of course very largely increased the aggregate rated capacity of your mine, did you not? I will not say very largely, but largely, increased the aggregate rated capacity of your mine, did you not?

A. Apparently that is the case. However, the same method was applied to all mines.

MR. GLASGOW: I think you ought to call attention, because it is not in evidence, to the fact that Exhibits 5 and 6 are a statement as to Falcon alone. Exhibit 10, which you are talking about, is a comparative statement as between it and other mines and the basis upon which the comparative statement goes is made on the basis that the same number of Sundays, the same number of holidays and the same number of delays by accident would apply to all the mines.

By MR. GOWEN:

Q. Now, as the result of increasing your aggregate rated capacity, you of course considerably decreased the percentage which the cars placed bore to the capacity? In other words, if your aggregate capacity had been less and you got the same number of cars, the percentage would have increased?

A. Would have been somewhat greater, yes.

Q. In the second period how many days did you use in arriving at the aggregate capacity of your mine?

A. There were 167 distribution sheets and we used 167 days.

Q. As against 138¼ which you say your mine was capable of working?

A. Yes, sir.

Q. And with the same result, of course, as to showing a decreased percentage of cars placed?

A. Yes, sir. Exactly the same method applied there as in the former case.

SIDNEY J. SANDERS, having been duly sworn, was examined as follows:

By MR. GOWEN:

Q. Referring to the order which has been put in evidence made by the Interstate Commerce Commission, finding a certain amount as due Jacoby & Company, will you please say whether you have taken the daily rating fixed by the Commission as proper, namely, 450 tons per day, and multiply that by 275 days, the days which the Commission found the plaintiff's mine would have been able to work in the year ending March 31, 1905, and tell us what the aggregate number of tons is, based upon those two figures?

A. 123,750 tons.

Q. In that same order the Commission has found that the plaintiff shipped in that period 38,714.23 tons and that they ought to have received cars which would have enabled them to ship 35,412.02 tons additional. If they had made those additional shipments what would the total volume of shipments have been?

A. 74,126.25 tons.

Q. What percentage of the aggregate capacity of the mine, based upon 450 tons per day and 275 days, are the aggregate shipments which would have been made, which you have just spoken of?

A. 59.9 per cent.

Q. Coming to the second period of the action, the Commission found that 450 tons per day was a proper rating for the mine and that the mine would have been capable of

working 138¼ days. What, on that basis, is the aggregate capacity of the mine in that period?

A. 62,212.51 tons.

Q. In their order the Commission found that in that period the mine had shipped 17,973.88 tons and that it should have received cars which would have enabled it to ship 19,104.77 tons additional. If it had made those additional shipments, what would have been the total shipments in that period?

A. 37,078.65 tons.

Q. And what percentage is that of the aggregate rated capacity based on 450 tons a day and 138¼ days.

A. 59.6.

Cross-examination.

By Mr. Glasgow:

Q. Will you go just a little further and tell us, if you have worked it out, the same way as to the other mines on the same division, what would have been their shipments?

A. I have not the answer for that.

Q. Of course not, and therefore your calculation of these mere figures is not worth anything on the proposition of discrimination as between this mine and others, is it?

Mr. Gowen: That is a matter of argument.

Q. If the question is one of discrimination, your figures there would not be of any value unless you knew what the other fellow was getting, would they?

Mr. Gowen: That is a question of argument. The witness cannot answer legal questions.

A. I cannot answer that.

Defendant Rests.

PLAINTIFF'S REBUTTING EVIDENCE.

ISAAC C. WEBER, having been duly sworn, was examined as follows:

By MR. GLASGOW:

Q. Something was said about the Berwind-White Coal Company getting, during the period from April 1, 1904, to April 1, 1905, a total of 13,452 cars and of that 460 cars were what they called commercial coal, 1774 was what they called company coal. That company coal was shipped by the Berwind-White Coal Company in cars of the Pennsylvania Railroad Company, consigned to the Pennsylvania Railroad Company at such points as they might designate, was it not?

A. I think so.

Q. In other words in that statement the term "company coal" means coal carried in the cars of the Pennsylvania Railroad?

A. I think so; yes, sir.

Q. Did you make up this plaintiff's Exhibit 10 before the Interstate Commerce Commission, which has been offered in evidence by Mr. Gowen? (Showing witness Exhibit.)

A. Yes, sir; Mr. Jacoby and I together made it up.

Q. Made it up from the distribution sheets of the Pennsylvania Railroad?

A. Yes, sir.

Q. And on that basis of statement, that is a comparative statement with other mines for the purpose of showing discrimination as between several mines, is it not?

A. Yes, sir.

Q. Exhibit 5, to which Mr. Gowen has referred, is an Exhibit worked up alone as to the Falcon No. 2 mine, showing the number of days it was in operation, is it not?

A. Yes, sir; it is.

Q. During the period covered by this suit?

A. Yes, sir.

Q. Of course, is it true or not that the other mines would not be working on Sundays and holidays, just as the Falcon was not working?

A. Yes, the same rule would apply to all mines.

Q. Then when you came to make the comparative statement and Exhibit No. 10 referred to, as between several mines, you took it as equally applicable to all, 308 days that there was distribution?

A. Yes, sir, we took that right from the days the distribution sheets were issued.

Q. And applied that to all equally on the question of discrimination?

A. Yes, sir.

Q. You ascertained, as I understand, that in the year from April 1, 1904, to April 1, 1905, and took in the first column, the rated capacity of the Falcon mine in cars and had it as 4331 cars for that period; is that correct?

A. That is correct, 4331 cars.

Q. That means, as I understand, that if it had gotten sufficient cars to carry the entire output that the company had been able to raise from its machinery and workings for 308 days, that it would have used 4331 cars?

A. Yes.

Q. Then you reduced that cars to number of tons, did you not?

A. Yes.

Q. And you used 32 tons to the car, did you not?

A. Yes, sir.

Q. Why did you use that figure?

A. I cannot tell you just why. This statement was made up a good while ago; but I think we had taken the actual number of steel cars and wooden cars and had proportioned in that way.

Q. Showing the actual shipment?

A. Yes; I think so.

Q. Then that showed that during that year—

A. Just a minute, as explanatory. We used that same basis on the whole.

Q. On all of them?

A. Applied to all the working out of the table.

Q. So that it was a factor that you used in all of the mines in this table?

A. The same figure relative to each individual mine.

Q. That showed that Falcon No. 2 on that basis would have shipped 138,600 tons during the year?

A. Yes, sir.

Q. Then the next figure shows the number of cars that you actually got there, does it not?

A. Yes, sir.

Q. How much was that?

A. 1,237.

Q. And you actually shipped how much?

A. 38,174 tons.

Q. You actually shipped what percentage of your capacity?

A. 28 per cent.

Q. Now will you take Standard No. 7? Do you see that?

A. Yes, sir.

Q. Was that a mine on the Tyrone Division?

A. Yes, sir.

Q. Its rating in cars—

A. On the same calculation.

Q. —was how much, in rating of cars?

A. 963 cars.

Q. And in tons for the year?

A. 30,800 tons.

Q. How many did it ship in tons?

A. It shipped 856, or 27,392 tons.

Q. It shipped during that year what percentage of its rated capacity?

A. 88.9 per cent. of the rated capacity.

Q. What was the percentage you shipped?

A. 28 per cent.

Q. So they shipped 60 per cent. more than you did?

A. Yes, sir; 60.9 per cent. more.

Q. Take the Berwind-White Coal Mining Company. During the same year that you shipped 28 per cent. of your capacity, what per cent. of its capacity did the Berwind-White Coal Mining Company ship?

A. 55.5.

Q. What percentage of its capacity did the Lehigh Valley Coal Company ship?

A. 70.9.

Q. As against the 28 which you shipped?

A. Yes, sir.

Q. Take Leland No. 1 mine. Is that on the Tyrone Division?

A. Yes, sir.

Q. During the same period that you shipped 28 per cent. of your capacity, what percentage of its capacity did Leland No. 1 ship?

A. Leland No. 1 shipped 73.5 per cent.

Q. Then the statement for the period from April 1, 1905, to October 15, 1905, is worked out the same way, showing capacity and the proportion of the capacity shipped by your mine as compared with the others?

A. Exactly the same way.

Q. During the period covered by this suit, there were 153 mines on those distribution sheets, on the Tyrone Division, including the Moshannon Branch and the Snow Shoe Branch, to which, on its distribution sheet, the railroad assigned a percentage rating; that is correct, is it not?

A. Yes.

Q. Is it not a fact that during that year and during the following nine months or ten months of the next year, that there were mines on that branch, or on that

division, which while they were assigned a rating for car distribution, were out of commission, idle, abandoned mines?

A. There were quite a large number of them. I think the basis of comparison covering this number of mines, whatever it is, represents about, 60 or 65 per cent. of the entire output of the Tyrone Division—I think so.

Q. In other words, the mines you worked up, the shipping mines, were about 65 or 66 per cent. of the entire rating that was made in the region?

A. I think so, yes, sir, if I remember correctly. There were a large number of idle mines.

Q. When you say idle mines or abandoned mines, you mean mines that did not want cars distributed?

A. Yes, sir.

Q. And did not order cars?

A. Did not order cars; yes, sir.

Cross-examination.

By Mr. Gowen:

Q. You have testified, in answer to Mr. Glasgow, that, counting all the cars which you have embraced in this statement as to Berwind-White Company's mines, this Exhibit 10, they shipped 68 per cent, in one period, I have forgotten which one it was.

A. 55.5, I think, in one period. I do not remember the other period.

Q. Have you made any calculation to find out what percentage was shipped by the Berwind-White Coal Company in Pennsylvania Railroad cars?

A. That estimate of shipment includes all the cars they received, as shown by the distribution sheets.

Q. In the second period you show that they shipped, or this statement shows, that they shipped 62.3 per cent. of their capacity and that in the period they got 60 Pennsylvania Railroad cars. How much could they ship in 60 cars, based on 32 tons a car?

A. 60 times 32.

Q. About 1900 tons?

A. Yes.

Q. And this statement shows that the aggregate capacity of cars of the Berwind operation was 7154, so that they shipped between two and three per cent., did they not, of their capacity in Pennsylvania Railroad cars in that period?

A. That statement shows the exact number of cars received. That 60 cars, I think, is—

MR. GLASGOW: That 60 does not include fuel cars.

By MR. GOWEN:

Q. It received 60 Pennsylvania Railroad cars, exclusive of those which were placed for fuel cars, which was 843, Mr. Glasgow said. As a matter of fact, they were able to ship in those 60 cars less than 3 per cent., were they not, of their mines' rating, which was given here as 7154 cars?

A. I would like to answer that question indirectly. If I remember correctly—we worked on those sheets in 1906—my recollection is that the assignment of Berwind cars was not made to each individual mine; they were made collectively which this sheet would show: Each day 40, 50, 60 or whatever the case may be, cars assigned. The table I have prepared there shows the sum total of cars received for each month, as taken off the distribution sheets, with so many cars assigned per day to Berwind-White operation.

Q. Mr. Glasgow also called attention to the percentage that Standard 7 had been enabled to ship. Do you not know that it was shipping in private cars?

A. I do not know whether they were or not.

Q. You do not know whether they were or not?

A. No. I do know they were receiving cars.

Q. You also said, in answer to a question of Mr. Glasgow, referring to the fuel cars of the defendant which had been placed at the Berwind-White Company's mines, that those cars were placed at those mines and loaded with fuel coal, consigned by the Berwind Com-

pany to points to which the shipments were to be made. Now you know, surely, that the Pennsylvania Railroad Company always buys its fuel coal delivered at the mine?

A. Yes.

Q. And it simply places its cars there to be loaded with that coal and then hauls those cars away to whatever destination it wants to take the coal to, and the shipper has nothing to do with the consignment of the cars; is not that so?

A. This may seem like a peculiar answer to the question, but we knew at the time we were operating that there was a lot of that coal that was marked as fuel coal had gone to commercial uses.

Q. I am speaking of coal that was fuel coal that was hauled.

A. Hauled as fuel coal and sold in the market as commercial coal.

Q. You know some cases of that sort?

A. Yes.

Q. Now I ask you whether the fuel coal which was actually fuel coal of the Pennsylvania Railroad Company was not delivered by the operators from whom that coal was purchased, to the Pennsylvania Railroad Company at the mines?

A. If that was shipped as commercial coal, I guess it was.

Q. You know what I am asking you. I am asking you whether that was true as to the fuel coal; not as to coal which was shipped as commercial coal, but as to the fuel coal?

A. Yes, that is true. As applied to fuel coal, that is true.

By Mr. Glasgow:

Q. If it was fuel coal, they were told where to ship it, even if the Pennsylvania Railroad received it in its cars?

A. Certainly.

By Mr. Gowen:

Q. You stated that you thought the shipments made by these selected mines which are embodied in Exhibit 10 represented from 60 to 65 per cent. of the total shipments made from the Tyrone Region?

A. Yes, sir; I think so.

Q. You heard the testimony, did you not, that in the first year, that is from April 1, 1904, to April, 1906, the cars placed at the mines in that region aggregated 66,504. That leaves out the Snow Shoe. You heard that testimony, did you not?

A. Mr. Freeman testified to that, I think.

Q. If it is correct that the cars placed at the mines in the Tyrone Region, exclusive of the Snow Shoe, amounted to over 66,000 in number in this first year, what percentage of that total number is represented by the cars placed at the mines included in this Exhibit, excluding therefrom the Lehigh Valley Coal Company mines which are in the Snow Shoe Region?

A. I could not answer that without figuring it.

Q. How many cars does this Exhibit embrace which were placed at mines in the Tyrone Region, and by that I mean to exclude the cars placed at the Lehigh Valley Coal Company's mines?

A. That would be 35,708 less 8,538.

Q. That would be about how many?

A. About 27,000.

Q. What percentage is that of 66,000? A little over 40, is it not?

A. I think so.

Q. 40 per cent. of 66 would be 26,400?

A. That is right.

Q. What is the total number of cars placed at the mines which are embraced in this Exhibit?

A. 16,032.

Q. Now, assuming as correct the testimony which has been given here that over 45,000 cars were placed at the mines in the Tyrone Region in that period, what

percentage of the total number is represented by these mines?

A. About 30 per cent.

Q. It is more than that?

A. It would not be quite 30 per cent.

S. L. CLARK, having been duly sworn, was examined as follows:

By MR. GLASGOW:

Q. Who is Mr. J. O. Clark?

A. A brother of mine.

Q. He is president of the Clark Coal Mining Company?

A. Yes, sir.

Q. What is your business?

A. Coal business.

Q. Where do you reside?

A. In Camden, N. J.

Q. Do you know whether a letter was received by your brother, as president of the Clark Coal Mining Company, dated March 6, 1907, from Mr. M. Trump, general superintendent of transportation of the Pennsylvania Railroad?

A. Yes, sir.

Q. Is this the letter? (Showing witness letter.)

A. Yes, sir; that is the letter.

MR. GLASGOW: We offer that letter in evidence.

MR. GOWEN: That letter was written in 1907 and relates to a period of time a year or so after the period covered by this action.

MR. GLASGOW: Do you insist upon the objection?

MR. GOWEN: Yes.

MR. GLASGOW: I withdraw the letter.

PLAINTIFF RESTS.

TESTIMONY CLOSED.

(At 4 p. m. adjourned until Tuesday, March 4, 1913, at 10 a. m.)

Philadelphia, Tuesday, March 4th, 1913, 10 a. m.

Present: parties as before noted.

MR. GOWEN: Yesterday, if your Honor please, it was understood that a certain statement which had been put in evidence before the Commission, which was referred to in the testimony here as the defendant's exhibit No. 2, should go in evidence in this case. We did not have a copy of it at that time, and I now produce a copy, and ask that it be inserted in the record.

The paper is as follows:

DISTRIBUTION OF CARS PLACED IN THE TYRONE REGION.

Month & Year	Region Rating in Cars	Fuel Cars of Deft.	Individual or private cars	Other cars
1904				
April	18,434	958	1,526	3,234
May	17,725	901	1,418	3,411
June	18,460	752	1,241	2,570
July	18,125	601	1,242	2,280
Aug.	19,689	703	1,156	2,991
Sept.	18,179	698	1,049	3,070
Oct.	19,545	904	1,407	3,242
Nov.	19,564	1,148	1,696	3,195
Dec.	20,548	1,650	1,640	3,215
1905				
Jan.	20,740	1,338	1,642	2,637
Feb.	19,194	1,720	2,066	2,045
March	22,314	1,135	3,167	2,856
April	20,750	1,540	2,135	2,491
May	21,580	1,527	1,900	2,753
June	21,580	1,879	1,866	2,163
July	21,550	1,577	1,706	2,762
Aug.	23,286	1,671	1,882	2,399
Sept.	21,620	1,991	2,245	3,027
Oct.	22,568	2,781	2,555	3,113
Total	385,451	25,474	33,539	53,454

MR. GOWEN: It was also understood that we would produce statements showing the aggregate ratings of the mines in the Tyrone Region, including in that region what has been referred to as the Snow Shoe Region, and the aggregate number of cars placed in the region, including also the Snow Shoe. Those statements have been prepared, and with consent of counsel for the plaintiff I ask that they be inserted in the record.

The papers are as follows:

TYRONE REGION (Including Snow Shoe Region).

April, 1904, to March, 1905, Inc.

Month		Region Rating in Cars Inc. Snow Shoe Reg.	Total Cars placed Inc. Snow Shoe Reg.
April	1904	20,384	6,317
May	"	19,600	6,652
June	"	20,410	5,145
July	"	20,000	5,295
August	"	21,714	5,312
September	"	20,054	5,748
October	"	21,495	6,462
November	"	21,439	6,899
December	"	22,498	7,514
January	1905	22,690	6,869
February	"	20,994	6,912
March	"	24,339	8,305
Total		255,617	77,430

TYRONE REGION (Including Snow Shoe Region).

April, 1905, to October, 1905, Inc.

Month		Region Rating in Cars Inc. Snow Shoe Reg.	Total Cars placed Inc. Snow Shoe Reg.
April	1905	22,625	6,385
May	"	23,530	6,784
June	"	23,530	6,415
July	"	23,425	6,572
August	"	25,311	6,412
September	"	23,495	8,017
October	"	24,518	9,250
Total		166,434	49,834

EDMUND C. HALEY, heretofore sworn, recalled and examined and testified as follows:

By MR. GOWEN:

Q. Referring to the statement for the period between April 1st, 1904, and April 1st, 1905, which shows the aggregate ratings of all the mines in the Tyrone Region, including those in the Snow Shoe Region, and the aggregate number of cars placed in all those mines, will you please say what percentage the cars placed were of the aggregate ratings of cars?

A. 30.3 per cent.

Q. And in the second period, taking the aggregate ratings of all the mines in that region, including the Snow Shoe Region, and the aggregate number of cars placed, what percentage did the cars placed reach of the aggregate ratings?

A. 29.9 per cent.

TESTIMONY CLOSED.

Counsel for the respective parties argued the case to the jury.

CHARGE OF THE COURT.

Hon. J. Whitaker Thompson, *J.*

Gentlemen of the Jury: This suit is brought to recover damages from the Pennsylvania Railroad Company by reason of alleged unjust and unlawful discrimination in the distribution of coal cars on the Tyrone Division of the Pennsylvannia Railroad. The suit is brought under what is known as the Act to Regulate Commerce. That Act forbids any carrier from making or giving undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The Act further provides that in case any common carrier, subject to its provisions, does anything prohibited by the Act, declared by the Act to be unlawful, or fails to do anything which the Act directs it to do, the carrier shall be liable to the person injured to the full amount of damages sustained by reason of the violation of the Act.

The Interstate Commerce Act further provides when any shipper makes complaint to the Interstate Commerce Commission of any unjust or unlawful discrimination which it is alleged has been practiced against it, that the Interstate Commerce Commission shall hear the complaint, and if it finds that the practice is unjustly and unlawfully discriminatory, it shall prescribe what shall be the just and lawful practice, and order the carrier to desist from the unlawful practice. It also gives the Commission authority to award damages to any person who claims to be injured by such unlawful and unjust discrimination, and after that order is made, if the carrier does not pay the amount which the Commission has ordered it to pay, then the party complaining may bring suit in the

United States Courts based on the order of the Commission, and that is how this case comes before you.

The plaintiffs here presented a claim to the Interstate Commerce Commission, and the parties were all there, and the Commission made certain findings and orders in the case, which have been offered in evidence before you. The Act makes the findings and orders of the Interstate Commerce Commission *prima facie* evidence of the facts therein stated, so that if the plaintiff comes into court and offers in evidence those findings and orders of the Commission, that, on its face, would be sufficient to entitle him to a verdict, unless the defendant should rebut the presumption raised in favor of those findings by additional evidence.

In this case the plaintiffs have offered in evidence the findings and orders of the Commission, in their favor, and they are entitled to weight as *prima facie* evidence—that is to say, they are, on their face, correct, unless the defendant has produced sufficient evidence to overcome the *prima facie* effect of those findings, and has convinced you, satisfied you, of another state of facts than that set out in the findings and orders.

The Commission's findings of fact you have heard read, and they find, among other things, that the practices employed in the distribution of coal cars in this particular case were unjust and discriminatory, and they stated in their original order wherein they are unjust and discriminatory, and they forbade the Railroad Company, the carrier, from continuing that practice of distribution. I will read the order of the Commission on that subject: "It appearing that it is and has been the defendant's rule, regulation and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods to deduct the capacity in tons of foreign railway fuel cars, private cars and system fuel cars, in the record herein referred to as "assigned cars", from the rated capacity in tons

of the particular mine receiving such cars, and to regard the remainder as the rated capacity of that mine in the distribution of all 'unassigned cars': It is ordered, That the said rule, regulation and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated, and is in violation of the third section of the Act to Regulate Commerce", and the order then continues with a prohibition against the defendant carrier from continuing to carry out that rule of distribution. The Interstate Commerce Commission further finds certain facts in relation to the distribution of cars to the plaintiff in this case. They find under the rating of the mine in question to which there was no objection by either party, that the rating was a fair rating, and that is 450 tons per day. They further find during the period during which the mines were operated, during the two periods, which they call the first and second period, the first period running from April 1st, 1904, to March 31st, 1905, and the second period from March 31st, 1905, to Oct. 18th, 1905—they find during the first period the mine was operated 275 days, and during the second period 138¼ days. Then, they find the number of tons which were actually shipped from the mines during those respective periods, and the number of tons that would have been shipped if the complainants had received their fair share of cars available for distribution. They further find the selling price of the coal for the first period, and the selling price for the second period, and they find what would have been the cost of production, based on an economical basis to the complainants on that coal, and what the profit would have been if they had received their full distribution of cars. They then find what the actual cost of production was, owing to the shortage of cars and what the difference between the actual cost of production and the economical basis they had determined it

could have been produced for was; they find what those two costs were, and compute the difference between that, and award the complainants, as damages first the difference between the economical cost of production and the market price of the coal, or, in other words, the profits on the transactions they would have made if they had received the proper amount of cars. Then, they award them an additional sum for damages for increased cost in output upon the coal that was actually shipped, and you have heard the figures which they have arrived at, and for which they have made an order on the defendant to pay.

Now, that is the *prima facie* finding of the Commission, and it is entitled to weight with you as being correct on its face, unless the defendant has produced evidence to show that some other state of facts exists, and that the plaintiffs have not suffered the damages which the Commission has awarded to them.

Now, the defendant has offered in evidence certain sheets showing what the total number of cars available during this period was and it has also offered evidence to show what the percentage would have been which should have gone to each shipper of coal in that locality, based on his possible daily output. The Commission has decided the manner of distribution of coal cars, and that is a question with which you have nothing to do. There findings on that subject are conclusive, as far as this Court and Jury are concerned. They find that the Railroad Company during this period was deducting from certain favored shippers a number of certain classes of cars which they received—that is to say, foreign fuel cars, private cars, and what were known as system fuel cars. They were deducting those cars from the number of cars which the certain favored mines required, and then giving them their percentage on the remainder out of the distributable cars which remained in their hands, and the Commission found that that was an unfair practice, that the number of private cars, company fuel cars, foreign fuel

cars, assigned to any mine, should have been deducted from the *pro rata* share of that mine, and charged against their share. They found that that was not done in this case, and that is the ground on which they based their damages. The defendant claims that the Railroad Company had no right to divert the cars belonging to a certain mine, private cars, from their owner, and that is correct. As I understand the ruling of the Commission, it is that while private cars shall be placed at the mine where they belong, and while that mine is entitled to its *pro rata* share, those cars cannot be distributed to any other mine, and the same way with foreign fuel cars, which in this case I understand belonged to the Lehigh Valley Coal and Iron Company or the Lehigh Valley Railroad Company, one or the other—at any rate, they were foreign fuel cars, and they were destined to certain points and received fuel for some other railroad company, and as to those cars they could not be diverted to other mines, but they must be charged against the allotment of the particular mine which receives them. As to the company fuel cars, the Pennsylvania Railroad Company fuel cars, they must be treated in the same way. That is to say, the mines receiving them must be charged with them, the same as though they were what are known as commercial cars.

Now, the defendant has offered evidence to show that the complainants did get approximately their full percentage of cars in the distribution. I think they claim that they were entitled to some 28 per cent., and that they got that percentage of cars. If you are satisfied from the evidence that this is the case, then, of course, they suffered no damage. The defendant also claims that the findings of the Interstate Commerce Commission are not sustained by the evidence which has been produced here. He cannot go back of the evidence before the Interstate Commerce Commission. We have to take the findings of the Commission in connection with the

other evidence in the case. If you are satisfied, however, that the distribution of system cars was such that the complainants got the percentage which they ought to have gotten, then they are not entitled to recover. If you are satisfied that they got some other percentage, or some percentage which would diminish the amount of damages which have been awarded by the Interstate Commerce Commission, they are only entitled to recover to the extent to which they are damaged by the failure to get the full percentage of cars. The law provides that a shipper shall recover the full amount of damages which he sustains, and in arriving at the amount of damages which these plaintiffs sustained, you can only take into consideration whether they have been discriminated against, and to what extent they were damaged by that discrimination. If one company got half of the cars which were distributable for that system, when it was only entitled to one-quarter, then the amount that the other shippers, the other mine owners, would be damaged, would be the amount to which their share would be diminished by giving that larger allotment to somebody else. In other words, if the Berwind-White Company got fifty-nine per cent. of its output, when the average allottable was twenty-eight per cent., it does not necessarily follow that the complainants would be damaged the entire difference between twenty-eight per cent. and fifty-nine per cent. They would be damaged the amount to which their number of cars would be reduced in the general allotment by favoring somebody else and taking the cars from them.

So that, if you find that the percertage of the complainants here was not reduced, the percentage which they should have gotten on a percentage basis, the cars distributable to that locality, if you find they got their full percentage then, of course, they cannot recover, but if you find that the percentage which they should have gotten was higher than what

they did get, then they suffered by reason of the difference in the number of cars allotted to them, and you would have to estimate their damages.

Now, if it comes to an estimate of damages by you, I do not know of any better rule to follow than that adopted by the Interstate Commerce Commission in this case. This is a case where these people were carrying on a continuous business. They have been in business for a length of time, the plant has been in operation, and if they are entitled to damages, their damages would be based on the loss of profits,—that is to say, the difference between the reasonable cost of production of the coal and the market price of the coal during that period on coal which they were unable to ship and could have shipped and would have had a market for if they were not prevented by reason of the acts of the defendant in failing to supply them with cars. They would also be entitled to the difference between the actual cost of production and the cost they would have been put to to produce the coal if they had not been discriminated against, as to the coal which they actually produced and shipped. The other rule would apply to coal which they would have shipped or might have shipped, if you find they would have shipped it, if they had not been discriminated against in the distribution of cars.

The defendant has asked me to charge you on certain points. I will refuse the first to the fourteenth points, inclusive.

"15. It was the duty of the defendant to apportion and deliver to the plaintiffs their fair share of all the cars available during the period of the action, for shippers in the district in which the plaintiffs' mine was located. If the plaintiffs received their fair and proper share of the cars so distributed in the district, they have no cause for complaint against the defendant upon the ground of discrimination.

and the burden is upon the plaintiffs to establish by satisfactory proof, that they did not receive their share."

I affirm that point.

"16. The defendant was obliged to place the private or individual cars of shippers at the mines of the owners of the cars, without regard to the consideration that the delivery of these cars gave to the owners thereof a larger percentage of their mines' rating than other shippers received who were not owners of private or individual cars."

I affirm that point, provided that the owners of cars were charged with those cars the same as though they had been the commercial cars of the Railroad.

"17. The defendant was at liberty to purchase during the period of the action coal for the use of its locomotives from any shippers on its line that it thought it to its interest to deal with, and to place cars at the mines of those from whom it purchased the coal into which the coal might be loaded without, thereby, subjecting itself to any charge or claim of discrimination upon the part or at the instance of any other shipper."

I affirm that point, with the same qualification as the last point.

"18. The defendant was obliged to place cars of other railroad companies, intended for their fuel supply, which were delivered to it by the companies owning such cars at the mines to which they were consigned, and the placing of such cars at these mines did not subject the paintiffs to any discrimination or disadvantage of which they can legally complain or for which they can recover in this action."

I affirm that point, with the same qualification as the last point.

The 19th and 20th points are refused.

Mr. GOWEN: If your Honor please, we would except to the following portions of your charge:

That portion of your charge in which you read to the jury the order of the Commission, and accompanied it with the statement that that embodied findings of fact which they should consider as such.

(Exception noted for defendant, by direction of the Court.)

Mr. GOWEN: Also that portion of your charge in which you instructed the jury that during the period of the action the evidence showed that the Railroad Company was deducting from certain favored shippers certain cars, company, fuel and individual cars. Our objection to that is that there is no evidence that those shippers were favored, except as a result of the system in force; that there was no personal favoritism. I do not know whether your Honor intended that.

The COURT: Gentlemen of the Jury, I do not want you to be misled by what I said about favored shippers. In speaking of shippers under this Act, the Act provides that carriers shall not discriminate against or in favor of anybody. I did not mean when I referred to favored shippers, shippers which were favored by the Railroad Company, but shippers which were alleged in this case to have received advantages which the plaintiffs did not receive in the distribution of coal cars.

Mr. GOWEN: We also except to that portion of your charge in which you instructed the jury that if they should find that the plaintiffs were entitled to a smaller percentage of the cars than the Commission found that they were entitled to, that the Jury was at liberty to reduce the damages awarded by the Commission to that extent. Our view is that this is an action to recover the award.

(Exception noted for defendant, by direction of the Court.)

MR. GOWEN: Also to that portion of your charge in which you instructed the Jury that if the Berwind-White Company got fifty-nine per cent. and the plaintiffs twenty-eight per cent., that it did not—you used the word "necessarily"—necessarily follow that the plaintiffs were damaged to the extent of the difference. I think, if your Honor please, that in giving that instruction, that the region percentage was what they were concerned with, that they should have been instructed absolutely that the plaintiffs were not entitled merely upon that showing to recover damages based upon the fifty-nine per cent.

(Exception noted for defendant, by direction of the Court.)

MR. GOWEN: Also to that portion of the charge where you instructed the Jury that in determining the plaintiffs' damages they should be ascertained with reference to the profit which the Jury should find they could make on coal for shipment on cars.

(Exception noted for defendant, by direction of the Court.)

MR. GOWEN: We also except to the refusal to charge as requested in the points that your Honor refused.

(Exception noted for defendant, by direction of the Court.)

MR. GLASGOW: We except to your Honor's affirmance of the defendant's points, which your Honor affirmed.

(Exception noted for plaintiff, by direction of the court.)

The points, submitted on behalf of the defendant, which were refused by the Court, are as follows:

"1. The Interstate Commerce Commission was without au-

thority to make the award upon which the action is based, as its jurisdiction does not extend to the consideration and adjudication of claims for damages or reparation of the character of that embraced in the present action. The plaintiffs, therefore, are not entitled to recover, and the verdict must be for the defendant.

2. The award made by the Commission is invalid, because there was left open for further consideration the question whether the whole amount awarded was properly payable to the plaintiffs.

3. To justify the Commission in making the award for the recovery of which this action has been brought, it must have been shown or established to its satisfaction by the evidence adduced before it that the plaintiffs had not received their proper share of the cars placed by the defendant, in the distribution of which the plaintiffs were entitled to participate, and which were used for interstate commerce or transportation. It appears that no evidence was presented to the Commission bearing upon this point, and that the award of the Commission was based upon the theory that whether the plaintiffs had been subjected to discrimination forbidden by the Interstate Commerce Act was to be determined by ascertaining whether they had received their proper share of all cars in the distribution of which they were entitled to participate, and not merely their share of the cars used for interstate commerce or transportation. The award consequently was invalid, and the plaintiffs are not entitled to recover.

4. The award of the Interstate Commerce Commission is based upon the conclusion that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine rating for 275 days, and in the period between April 1, and October

18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine rating for 138¼ days. It is apparent that this conclusion of the Commission was based upon the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located, had been equal in the earlier period to 59.9% and in the later period 59.6% of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have been placed at the plaintiffs' mine, the basis for the Commission's award was an erroneous one, and the plaintiffs consequently are not entitled to recover.

5. It has been affirmatively established by the evidence adduced upon the part of the defendant that if distribution had been made of its cars in accordance with the method prescribed by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9% of the rating of their mine, and in the period between April 1, 1905, and October 18, 1905, cars equal in capacity to 59.6% of the rating of their mine. As the award of the Commission was based upon the theory that cars equal in capacity to these percentages should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover.

6. It appears that there were included in the cars placed at the mines which the plaintiffs' testimony tended to show had received cars equal in capacity to 59.9% and 59.6% in the two periods of the aggregate of their mines' rating, individual or private cars of shippers, fuel cars of the defendant, and fuel cars of other railroad companies. The plaintiffs were not entitled to participate in the distribution of cars of

either of these three classes, and consequently the percentages which these selected mines received should not have been used as the basis for ascertaining the number of cars which the plaintiffs should have received, even upon the assumption that the number of cars placed at these selected mines furnished the standard by which the number should be ascertained which the plaintiffs should have received. The adoption, therefore, by the Interstate Commerce Commission of the percentages received by these mines as the standard for the ascertainment of the number which the plaintiffs should have received was an error, and the award made in favor of the plaintiffs was consequently invalid.

7. Under the law and the evidence the plaintiffs are not entitled to recover, and your verdict should be for the defendant.

If the Court should decline to charge as above requested, then it is respectfully asked to charge as follows:

8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine ratings, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9% and in the later period to 59.6% of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover.

9. If the jury find that if the defendant had made distribution of its cars in accordance with the method prescribed as proper by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9% of the rating of their mine, and in the period between April 1, 1905, and October 18, 1905, cars equal in capacity to 59.6% of the rating of their mine, and that the award of the Commission was based upon the theory or conclusion that cars equal in capacity to these percentages, respectively, should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover.

10. The rating for purposes of car distribution given by the defendant to the plaintiffs' mine was 450 tons a day, the equivalent of 18 cars. This was a fair and proper rating, and subjected the plaintiffs to no undue or unjust discrimination.

11. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 232,517 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 66,504. The cars thus delivered were, therefore, equal to 28.5% of the ratings. That in this same period the plaintiffs received cars equal to 28% of their mine's rating. Had they received cars equal to the region rating, viz., 28.5%, they would have received additional cars equal to 00.5% of the aggregate of their mine's rating, and as this was 4301 cars they would have received 22 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the

defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region) regardless of the consideration that in the distribution of some of these cars they were not entitled to participate.

12. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 152,934 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 45,963. The cars thus delivered were, therefore, equal to 30.1% of the ratings. That in this same period the plaintiffs received cars equal to 23.9% of their mine's rating. Had they received cars equal to the Region rating, viz., 30.1% they would have received additional cars equal to 6.2% of the aggregate of their mine's rating, and as this was 2348 cars, they would have received 146 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region) regardless of the consideration that in the distribution of some of these cars they were not entitled to participate.

13. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region, (including those in the Snow Shoe Region) aggregated 255,617 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 77,430. The cars thus delivered were, therefore, equal to 30.3% of the ratings. That in this same period the plaintiffs received cars equal to 28% of their mine's rating. Had they received cars equal to the region rating, viz., 30.3%, they would have re-

ceived additional cars equal to 2.3% of the aggregate of their mine's rating, and as this was 4301 cars, they would have received 98 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region) regardless of the consideration that in the distribution of some of these cars they were not entitled to participate.

14. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region, (including those in the Snow Shoe Region) aggregated 166,434 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 49,834. The cars thus delivered were, therefore, equal to 29.9% of the ratings. That in this same period the plaintiffs received cars equal to 23.9% of their mine's rating. Had they received cars equal to the region rating, viz., 29.9%, they would have received additional cars equal to 6% of the aggregate of their mine's rating, and as this was 2348 cars, they would have received 141 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of these cars they were not entitled to participate.

19. The damages, if any, sustained by the plaintiffs consequent upon their inability to mine and ship an addi-

tional amount of coal, cannot properly be measured by the estimated profit which would have accrued to them on such additional output. As the plaintiffs have presented no evidence from which the jury can ascertain or measure the damages upon any other basis, the recovery must be confined to nominal damages.

20. There is no evidence that would warrant the jury in finding that the plaintiffs, under the theory of distribution prescribed as proper by the Interstate Commerce Commission, were entitled, in the period of the action, to any more cars than they received, because no evidence has been presented which would warrant the jury in finding that the plaintiffs had received in this period fewer cars than they were entitled to if in arriving at the number of cars for distribution among shippers generally, there were to be excluded the private or individual cars of shippers, the fuel cars of the defendant, and the fuel cars of other Railroad Companies consigned by them to certain mines."

STIPULATION.

IT IS STIPULATED that the reports and orders of the Interstate Commerce Commission filed with the plaintiff's statement of claim, are and shall be a part of the Bill of Exceptions in this case, but instead of printing the same twice, the reports and orders aforesaid shall be printed with the statement of claim, and being so printed, may be referred to as a part of the Bill of Exceptions.

F. I. Gowen,
for Deft.

Wm. A. Glasgow, Jr.,
for Plff.

March 24th, 1913.

And thereupon, the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the defendant did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this eighth day of April, 1913.

J. W. THOMPSON,
District Judge.
(Seal)

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO.

Filed March 8, 1913.

And now, to wit, March 8, 1913, counsel for the defendant move the Court to have all the evidence taken upon the trial duly certified and filed, so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
Counsel for Defendant.

ORDER OF COURT.
Filed April 4, 1913.

Before THOMPSON, *J.*

And now, to wit, this 4th day of April, 1913, IT IS ORDERED that the motions for new trial and for judgment *non obstante veredicto* be denied.

BY THE COURT,
Attest:
LEO A. LILLY,
Deputy Clerk.

ORDER OF COURT.
Filed May 19, 1913.

Before THOMPSON, *J.*

And now, to wit, this 19th day of May, 1913, plaintiff having presented to the Court the record in this case before the Interstate Commerce Commission, and upon oral statement in open court in the presence of counsel for defendant as to the services performed before the Interstate Commerce Commission, and in this court,

IT IS ORDERED that counsel for plaintiff be allowed a counsel fee of Twenty-five Hundred ($2500) Dollars for his services in the proceedings before the Interstate Commerce Commission; and a further fee of Twenty-five hundred ($2500) Dollars for his services in the proceedings in this court.

FURTHER ORDERED that an exception be granted to the allowance by the Court of a fee to counsel for plaintiff for services in the proceedings before the Interstate Commerce Commission, and also to the amount of the fee

allowed for services before the Commission, and also to the amount of the fee allowed for services in this court.

BY THE COURT,

Attest:

GEORGE BRODBECK,
Deputy Clerk.

PRÆCIPE FOR JUDGMENT.

Filed May 21, 1913.

Enter judgment in favor of plaintiff and against defendant in the above entitled cause in the sum of Twenty-eight thousand five hundred and seventy-two dollars and fifty-four cents ($28,572.54) as per verdict of the jury.

WM. A. GLASGOW, JR.,
Attorney for Plaintiff.

JUDGMENT.

Before THOMPSON, *J.*

And now this 21st day of May, 1913, in accordance with præcipe filed judgment is hereby entered on the verdict in the above entitled case in favor of the plaintiff and against defendant in the sum of Twenty-eight thousand five hundred and seventy-two and 54-100 dollars ($28,572.54).

Attest:

LEO A. LILLY,
Deputy Clerk.

PETITION FOR WRIT OF ERROR.
Filed May 21, 1913.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

And now, May 21, 1913, comes The Pennsylvania Railroad Company, defendant herein, and says that on or about the twenty-first day of May, 1913, this Court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this Petition.

Wherefore, this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Third Circuit for the correction of errors so complained of, and that the transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
Attorneys for Defendant.

ORDER OF COURT.
Filed May 21, 1913.

Before THOMPSON, *J.*

And now, May 21, 1913, upon motion of Francis I. Gowen and John G. Johnson, attorneys for the defendant, and upon filing a Petition for a Writ of Error and

Assignment of Errors, it is ordered that a Writ of Error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Third Circuit, the judgment heretofore entered herein, and the amount of bond on said Writ of Error be and is hereby fixed in the sum of $57,145.08.

BY THE COURT,
Attest:
GEORGE BRODBECK,
Deputy Clerk.

Assignments of Error.

Filed May 21, 1913.

And now, The Pennsylvania Railroad Company, defendant in this cause, files with its Petition for a Writ of Error the following Assignments of Error, upon which it will rely upon its Appeal from the judgment in this court entered in this cause, and which appear in the record and proceedings in this cause:

I.

The learned trial Judge erred in admitting in evidence the Report of the Interstate Commerce Commission of May 7, 1910, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, vs. The Pennsylvania Railroad Company, No. 1139.

II.

The learned trial Judge erred in admitting in evidence the Order of the Interstate Commerce Commission of May 7, 1910, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company vs. The Pennsylvania Railroad Company, No. 1139.

III.

The learned trial Judge erred in admitting in evidence the Supplemental Report of the Interstate Commerce Commission of March 11, 1912, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, vs. The Pennsylvania Railroad Company, No. 1139.

IV.

The learned trial Judge erred in admitting in evidence the Supplemental Order of the Interstate Commerce Commission of March 11, 1912, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, vs. The Pennsylvania Railroad Company, No. 1139.

V.

The learned trial Judge erred in refusing to admit in evidence the testimony and exhibits appearing in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, vs. The Pennsylvania Railroad Company, before the Interstate Commerce Commission, No. 1139.

VI.

The learned trial Judge erred in refusing to affirm the first point submitted by the defendant, as follows:

> "1. The Interstate Commerce Commission was without authority to make the award upon which the action is based, as its jurisdiction does not extend to the consideration and adjudication of claims for damages or reparation of the character of that embraced in the present action. The plaintiffs, therefore, are not entitled to recover, and the verdict must be for the defendant."

VII.

The learned trial Judge erred in refusing to affirm the

second point submitted by the defendant, as follows:

> "2. The award made by the Commission is invalid, because there was left open for further consideration the question whether the whole amount awarded was properly payable to the plaintiffs."

VIII.

The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:

> "3. To justify the Commission in making the award for the recovery of which this action has been brought, it must have been shown or established to its satisfaction by the evidence adduced before it that the plaintiffs had not received their proper share of the cars placed by the defendant, in the distribution of which the plaintiffs were entitled to participate, and which were used for interstate commerce or transportation. It appears that no evidence was presented to the Commission bearing upon this point, and that the award of the Commission was based upon the theory that whether the plaintiffs had been subjected to discrimination forbidden by the Interstate Commerce Act was to be determined by ascertaining whether they had received their proper share of all cars in the distribution of which they were entitled to participate, and not merely their share of the cars used for interstate commerce or transportation. The award consequently was invalid, and the plaintiffs are not entitled to recover."

IX.

The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:

> "4. The award of the Interstate Commerce Commis-

sion is based upon the conclusion that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine ratings for 275 days, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine rating for 138¼ days. It is apparent that this conclusion of the Commission was based upon the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located, had been equal in the earlier period to 59.9% and in the later period to 59.6% of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have been placed at the plaintiffs' mine, the basis for the Commission's award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

X.

The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, as follows:

"5. It has been affirmatively established by the evidence adduced upon the part of the defendant that if distribution had been made of its cars in accordance with the method prescribed by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9% of the rating of their mine, and in the period between April 1, 1905, and October 18, 1905, cars equal in capacity to 59.6% of the rating of their mine. As the award of the Commission was based upon the theory that cars

equal in capacity to these percentages should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover."

XI.

The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant, as follows:

"6. It appears that there were included in the cars placed at the mines which the plaintiffs' testimony tended to show had received cars equal in capacity to 59.9% and 59.6% in the two periods of the aggregate of their mines' rating, individual or private cars of shippers, fuel cars of the defendant, and fuel cars of other railroad companies. The plaintiffs were not entitled to participate in the distribution of cars of either of these three classes, and consequently the percentages which those selected mines received should not have been used as the basis for ascertaining the number of cars which the plaintiffs should have received, even upon the assumption that the number of cars placed at these selected mines furnished the standard by which the number should be ascertained which the plaintiffs should have received. The adoption, therefore, by the Interstate Commerce Commission of the percentages received by these mines as the standard for the ascertainment of the number which the plaintiffs should have received was an error, and the award made in favor of the plaintiffs was consequently invalid."

XII.

The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, as follows:

"7. Under the law and the evidence the plaintiffs

are not entitled to recover, and your verdict should be for the defendant."

XIII.

The learned trial Judge erred in refusing to affirm the eighth point submitted by the defendant, as follows:

"8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine ratings, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9% and in the later period to 59.6% of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

XIV.

The learned trial Judge erred in refusing to affirm the ninth point submitted by the defendant, as follows:

"9. If the jury find that if the defendant had made distribution of its cars in accordance with the method prescribed as proper by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9% of the rating of their mine, and in the period between April 1, 1905, and

October 18, 1905, cars equal in capacity to 59.6% of the rating of their mine, and that the award of the Commission was based upon the theory or conclusion that cars equal in capacity to these percentages, respectively, should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover."

XV.

The learned trial Judge erred in refusing to affirm the tenth point submitted by the defendant, as follows:

"10. The rating for purposes of car distribution given by the defendant to the plaintiffs' mine was 450 tons a day, the equivalent of 18 cars. This was a fair and proper rating, and subjected the plaintiffs to no undue or unjust discrimination."

XVI.

The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

"11. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 232,517 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 66,504. The cars thus delivered were, therefore, equal to 28.5% of the ratings. That in this same period the plaintiffs received cars equal to 28% of their mine's rating. Had they received cars equal to the region rating, viz., 28.5%, they would have received additional cars equal to 00.5% of the aggregate of their mine's rating, and as this was 4301 cars, they would have received 22 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs

would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region) regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XVII.

The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

"12. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 152,934 cars, and that the cars of all classes delivered by the defendant at those mines aggregated 45,963. The cars thus delivered were, therefore, equal to 30.1% of the ratings. That in this same period the plaintiffs received cars equal to 23.9% of their mine's rating. Had they received cars equal to the Region rating, viz., 30.1%, they would have received additional cars equal to 6.2% of the aggregate of their mine's rating, and as this was 2346 cars, they would have received 146 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of those cars they were not entitled to participate."

XVIII.

The learned trial Judge erred in refusing to affirm the thirteenth point submitted by the defendant, as follows:

> "13. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region (including those in the Snow Shoe Region) aggregated 255,617 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 77,430. The cars thus delivered were, therefore, equal to 30.3% of the rating. That in this same period the plaintiffs received cars equal to 28% of their mine's rating. Had they received cars equal to the region rating, viz., 30.3%, they would have received additional cars equal to 2.3% of the aggregate of their mine's rating, and as this was 4,301 cars, they would have received 98 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, and if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XIX.

The learned trial Judge erred in refusing to affirm the fourteenth point submitted by the defendant, as follows:

> "14. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region (including those in the Snow Shoe Region) aggregated 166,434 cars, and that the cars of all classes de-

livered by the defendant at these mines aggregated 49,834. The cars thus delivered were, therefore, equal to 29.9% of the ratings. That in this same period the plaintiffs received cars equal to 23.9% of their mine's rating. Had they received cars equal to the region rating, viz., 29.9%, they would have received additional cars equal to 6% of the aggregate of their mine's rating, and as this was 2,348 cars, they would have received 141 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XX.

The learned trial Judge erred in refusing to affirm the nineteenth point submitted by the defendant, as follows:

"19. The damages, if any, sustained by the plaintiffs consequent upon their inability to mine and ship an additional amount of coal, cannot properly be measured by the estimated profit which would have accrued to them on such additional output. As the plaintiffs have presented no evidence from which the jury can ascertain or measure the damages upon any other basis, the recovery must be confined to nominal damages."

XXI.

The learned trial Judge erred in refusing to affirm the twentieth point submitted by the defendant, as follows:

"20. There is no evidence that would warrant

the jury in finding that the plaintiffs, under the theory of distribution prescribed as proper by the Interstate Commerce Commission, were entitled in the period of the action, to any more cars than they received, because no evidence has been presented which would warrant the jury in finding that the plaintiffs had received in this period fewer cars than they were entitled to if in arriving at the number of cars for distribution among shippers generally, there were to be excluded the private or individual cars of shippers, the fuel cars of the defendant, and the fuel cars of other Railroad Companies consigned by them to certain mines."

XXII.

The learned trial Judge erred in refusing the defendant's motion for judgment *non obstante veredicto* upon the whole record.

XXIII.

The learned trial Judge erred in allowing a counsel fee for the services of the plaintiffs' counsel in the proceeding before the Interstate Commerce Commission.

XXIV.

The learned trial Judge erred in allowing a counsel fee of $2,500 for the services of the plaintiffs' counsel before the Interstate Commerce Commission.

XXV.

The learned trial Judge erred in allowing a counsel fee of $2,500 for the services of the plaintiffs' counsel before the learned trial Court.

XXVI.

The learned trial Judge erred in entering judgment in favor of the plaintiffs, against the defendant, upon the verdict of the jury.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
Attorneys for Defendant.

PRÆCIPE.

Filed May 23, 1913.

To the Clerk of the District Court of the United States for the Eastern District of Pennsylvania:

In making up the Transcript of Record Sur Writ of Error in the above entitled case, you will please omit the following papers:

Defendant's Motion and Reasons for New Trial.

FRANCIS I. GOWEN,
Attorney for Defendant.

UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF PENNSYLVANIA. } *set:*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of pleas and proceedings in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading under the firm name of W. F. Jacoby & Company, v. Pennsylvania Railroad Company, No. 2008, June Session, 1912, as per præcipe filed, a copy of which is hereto attached, now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 31st day of May, in the year of our Lord one thousand nine hundred and thirteen, and in the one hundred and thirty-seventh year of the Independence of the United States.

(SEAL)

WILLIAM W. CRAIG,
Clerk District Court U. S.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1755.

PENNSYLVANIA RAILROAD CO., Plaintiff in Error,
vs.
W. F. JACOBY et al., Defendants in Error.

And afterwards, to wit, on the 14th and 15th days of October, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, *and* the Court not being fully advised in the premises, takes further time for the consideration thereof.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1755.

PENNSYLVANIA RAILROAD CO.
vs.
W. F. JACOBY & CO.

Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Gray, Buffington, and McPherson, Circuit Judges.

In order to be guided to a proper decision of the controversy appearing upon the record of this writ of error, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court; and accordingly certifies the following questions, under section 239 of the Judicial Code:

W. F. Jacoby & Co. owned and mined coal from land situated along the railroad of the Pennsylvania Railroad Co., and shipped the coal over the road in interstate commerce. They believed themselves to be injured by what they averred to be discriminating practices in the Railroad's distribution of cars. Thereupon, they made proper complaint of such practices to the Interstate Commerce Commission, and thereafter the Commission held hearings, and both parties presented evidence and arguments. In due course the Commission made two reports, finding inter alia that the practices complained of had been discriminating during the period in question, and ordering them to be abandoned. The Commission reported inter alia as follows:

"We find that by reason of the discriminations asserted and set forth in our report in Jacoby vs. P. R. R. Co., 19 I. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907."

The Commission also made the following order:

"It is ordered that the above-named defendant (Penna. R. R. Co.) be, and it is hereby authorized and directed to pay unto complainant- W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Co., on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of six per cent. per annum from June 20, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission."

The Railroad Company did not comply with the order of reparation, whereupon Jacoby & Co. in due form prosecuted to trial in the District Court a petition under section 16 of the Act to Regulate Interstate Commerce. At the trial the two reports of the Commission, including the foregoing finding and order, were admitted in evidence on behalf of Jacoby & Co., and were submitted to the jury.

The questions upon which the Circuit Court of Appeals desires instruction are these:

This being a suit for damages under section 16 of the Interstate Commerce Act,

(1) Were the two reports of the Commission as a whole (including the finding and the order quoted above) prima facie evidence of the matters therein contained?

(2) Were the finding and the order quoted above—or was either of them—prima facie evidence of themselves, or of itself, that the defendant had become liable to Jacoby & Co. in some amount by the discriminating practices referred to?

(3) If the finding and the order—either, or both, of them—were prima facie evidence that the defendant had become liable in some amount, were they—or was either of them—prima facie evidence also of the amount of such damage?

(Signed) GEORGE GRAY,
JOSEPH BUFFINGTON,
JOHN B. McPHERSON,
Circuit Judges.

Feb. 26, 1914.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Pennsylvania Railroad Co. vs. W. F. Jacoby & Company on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-third day of June in the year of our Lord one

thousand nine hundred and fifteen and of the Independence of the United States the one hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Pennsylvania Railroad Company is plaintiff in error and W. F. Jacoby & Co. are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of June, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 24,194. Supreme Court of the United States, No. 464, October Term, 1914. Pennsylvania Railroad Company vs. W. F. Jacoby & Co. Writ of Certiorari. Received & Filed Jun- 21, 1915. Saunders Lewis, Jr., Clerk.

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby make return to the annexed writ of certiorari issued out of the Supreme Court of the United States in the case therein entitled, on the sixteenth day of June, A. D. 1915, by annexing hereto a certified copy of the Transcript of Record in said case.

In testimony whereof, I hereto set my hand and affix the seal of the United States Circuit Court of Appeals at the City of Philadelphia, State of Pennsylvania, this twenty-third day of June, A. D. 1915.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[Endorsed:] File No. 24,194. Supreme Court U. S., October term, 1915. Term No. 139. Pennsylvania Railroad Co., pl'ff in error, vs. W. F. Jacoby et al. Writ of certiorari and return. Filed June 25, 1915.

FILED
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CLERK OF THE

IN THE

SUPREME COURT OF THE UNITED STATES.

No. [redacted] 1322 October Term, 1916.

Pennsylvania Railroad Company,
Plaintiff-in-Error,

vs.

W. F. Jacoby and Isaac C. Weber, Co-partners, trading under the firm name of W. F. Jacoby & Company,
Defendants-in-Error.

PETITION AND MOTION OF DEFENDANTS-IN-ERROR FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO REQUIRE THE WHOLE RECORD AND CAUSE TO BE SENT UP TO THE SUPREME COURT, TOGETHER WITH A COPY OF THE CERTIFICATE OF SAID COURT OF APPEALS.

WM. A. GLASGOW, JR.,
Counsel for Petitioners.

Law Print Publishing Company, 344 Walnut Street, Phila.

IN THE

Supreme Court of the United States.

October Term, 1914. No. 464.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, Co-partners, trading under the firm name of W. F. JACOBY & COMPANY,
Defendants-in-Error.

PETITION OF DEFENDANTS-IN-ERROR, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO REQUIRE THE WHOLE RECORD AND CAUSE TO BE SENT UP TO THE SUPREME COURT, TOGETHER WITH COPY OF CERTIFICATE OF SAID COURT OF APPEALS.

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioners, W. F. Jacoby and Isaac C. Weber, co-partners, trading under the firm name of

W. F. Jacoby & Company, respectfully petitioning, show unto your Honors:

That in a certain proceeding under the provisions of Section 16 of the Act to Regulate Commerce, entitled *Pennsylvania Railroad Company, Plaintiff-in-Error, vs. W. F. Jacoby and Isaac C. Weber, co-partners, trading under the firm name of W. F. Jacoby & Company, Defendants-in-Error*, then pending in the United States Circuit Court of Appeals for the Third Circuit, the Honorable Judges of the Court of Appeals of said Circuit have certified to this Court, which certificate is docketed as No. 464 of October Term, 1914, certain questions or propositions of law concerning which said Circuit Court of Appeals desired the instructions of this Court for the proper decision thereof by said Court of Appeals.

That a copy of said certificate is appended hereto and made a part of this petition; and that there is submitted herewith a certified copy of the transcript of the record, including all proceedings in said Circuit Court of Appeals.

That the whole cause of action and entire controversy is shown by the pleadings; that the facts stated in the certificate of the said Third Circuit Court of Appeals, and the record aforesaid shows that this was a proceeding under Section 16 of the Act to Regulate Commerce, begun by your petitioners by a petition filed in the District Court of the United States for the Eastern District of Pennsylvania, in accordance with the procedure prescribed in Section 16 of the Act to Regulate Commerce, to recover reparation in damages from the Pennsylvania Railroad Company, defendant below and plaintiff-in-error, for an alleged undue and unjust discrimination against your petitioners and in favor of certain other competing persons

and corporations in the distribution of coal cars by said Pennsylvania Railroad Company among the mines upon the Clearfield Division of said railroad, on which said Division your petitioners, during the period from April 1, 1904 to October 18, 1905, were mining and shipping coal as lessees and operators of a certain coal mine known as Falcon No. 2.

Your petitioners show that the acts and injuries, for which reparation is claimed, took place and occurred between April 1, 1904, and October 18, 1905; that in June, 1907, your petitioners duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices of defendant to the prejudice of petitioners and in violation of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory and supplemental thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainants therein reparation in damages to such an amount as it might be ascertained that said complainants had thereby suffered. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and resulted in a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., on Docket No. 1139, Opinion No. 1564, dated March 7, 1910.

After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of fact and of law on the part of complainants and of defendant, upon the question of reparation alone, there resulted a further finding regularly and properly made by the Commission

on March 11, 1912, ordering the defendant to make reparation to petitioners "in the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by the Commission to have been unlawful and unjust as more fully and at large appears in and by said reports of the Commission."

Whereupon your petitioners, on July 19, 1912, filed their petition, aforesaid, in the United States District Court for the Eastern District of Pennsylvania, setting forth the above facts and praying that said Court enter judgment in favor of petitioners and against the said defendant, the Pennsylvania Railroad Company, for the sum of Twenty-seven thousand, three hundred and thirty-two dollars and fifty-five cents ($27,332.55), as hereinbefore set forth, with legal interest thereon from June 1, 1912, and costs including a reasonable attorney's fee. That a demurrer filed to said suit on September 18, 1912, was, on November 12, 1912, dismissed by said Court. That on November 16, 1912, the defendant (Pennsylvania Railroad Company) pleaded not guilty, and, the case coming on for trial before the Court and a jury, a verdict was rendered, on March 4, 1913, as follows:

> "And afterwards, to wit, on the 4th day of March, 1913, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages in the sum of Twenty-eight Thousand Five Hundred and Seventy-two and 54-100 ($28,572.54) Dollars."

That motions for new trial and for judgment *non obstante veredicto* were denied, and upon May 19, 1913, the Court entered an order "that counsel for plaintiff be allowed a counsel fee of Twenty-five Hundred

($2500) Dollars for his services in the proceedings before the Interstate Commerce Commission; and a further fee of Twenty-five hundred ($2500) Dollars for his services in the proceedings in this court."

That on May 21, 1913, the Court entered judgment "on the verdict in the above entitled case in favor of the plaintiff and against defendant in the sum of Twenty-eight thousand five hundred and seventy-two and 54-100 dollars ($28,572.54)." That on May 21, 1913, a writ of error was allowed to the United States Circuit Court of Appeals for the Third Circuit. That on the 26th day of February, 1914, certain questions raised in this proceeding were certified to this Court by the Circuit Court of Appeals for the Third Circuit, as by said copy of certificate hereto appended more fully appears.

Your petitioners show that the questions certified to this Honorable Court were in fact and in effect the same questions raised in certain other cases then pending before this Court, to wit, *Meeker, Surviving Partner, &c., vs. Lehigh Valley R. R. Co.*, and *Meeker vs. Lehigh Valley R. R. Co.*, being Nos. 434 and 435 of October Sessions, 1914 of this Court, which said cases were finally determined in this Court on February 23, 1915, and are reported in 236 U. S., pp. 412, 434, certain of the questions of law there determined being the same which were certified to this Court in the present proceeding; and your petitioners further show that said questions of law, certified as aforesaid, were decided in said cases of *Meeker, Surviving Partner, &c., vs. Lehigh Valley R. R. Co.* and *Meeker vs. Lehigh Valley R. R. Co.*, in entire and substantial accord with the contention of your petitioners in the present case, in which said present case the same or exactly similar questions were certified for the determination of this Court.

Your petitioners show that the alleged wrongful acts and practices out of which this present suit arose occurred in 1904 and 1905, and that a proceeding before the Interstate Commerce Commission, preliminary to an action to recover damages for the same, was begun in 1907; and said Interstate Commerce Commission has finally determined the fact of such acts or practices and the unjust and unlawful character of such acts and practices, and ascertained and assessed the damages sustained by your petitioners by reason of such unjust and unlawful acts and practices, the final finding of the Commission being handed down on March 11, 1912; and that judgment was duly had in the United States Court of the Eastern District of Pennsylvania on May 21, 1913, for the amount of the damages so ascertained and assessed.

Your petitioners aver and believe, that, had the certificate of the Honorable Judges of the Circuit Court of Appeals brought up the entire record and all matters in connection therewith, all doubts as to the power of the United States District Court to proceed herein and to enter judgment in the manner and amount appearing in said record would be resolved by this Honorable Court in favor of your petitioners. Whereas, if this Honorable Court should pass only upon the questions certified to it, further delay will result, involving unnecessary hardship and injury to your petitioners.

Your petitioners further show that the questions certified to your Honorable Court did not involve a failure of jurisdiction in the United States District Court for the Eastern District of Pennsylvania, or in the United States Circuit Court of Appeals for the Third Circuit, but involved the question of the admissibility and effect to be given to certain reports and findings of

the Interstate Commerce Commission under the Act to Regulate Commerce and other Federal acts; and that the other matters and questions arising in this case are questions as to the effect, under said Act to Regulate Commerce and other Federal Acts, of certain evidence offered by plaintiffs and defendant in this case, and admitted by the learned trial judge, and of the charge of the said learned trial judge in submitting the case to the jury upon said evidence.

WHEREFORE, your petitioners pray that this Honorable Court may require that the whole record and cause be sent up to it for its consideration, and thereupon this Court may decide the whole matter in controversy in the same manner as if it had been brought before this Honorable Court for review by writ of error or appeal, and your petitioners, as in duty bound, will ever pray, etc.

W. F. JACOBY,
ISAAC C. WEBER,
Co-partners trading as W. F. Jacoby & Company.

By WM. A. GLASGOW, JR.,
Counsel.

CERTIFICATE.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

October Term, 1913. No. 1755.

PENNSYLVANIA RAILROAD CO.,
Plaintiff in Error,

vs.

W. F. JACOBY, *et al.*,
Defendants in Error.

And afterwards, to wit, on the 14th and 15th days of October, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

October Term, 1913. No. 1755.

PENNSYLVANIA RAILROAD CO.,

vs.

W. F. JACOBY & CO.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Before GRAY, BUFFINGTON and MCPHERSON, *Circuit Judges.*

In order to be guided to a proper decision of the controversy appearing upon the record of this writ of error, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court, and accordingly certifies the following questions, under Section 239 of the Judicial Code:

W. F. Jacoby & Co. owned and mined coal from land situated along the railroad of the Pennsylvania Railroad Co., and shipped the coal over the road in interstate commerce. They believed themselves to be injured by what they averred to be discriminating practices in the Railroad's distribution of cars. Thereupon, they made proper complaint of such practices to the Interstate Commerce Commission, and thereafter the Commission held hearings, and both parties pre-

sented evidence and arguments. In due course the Commission made two reports, finding *inter alia* that the practices complained of had been discriminating during the period in question, and ordering them to be abandoned. The Commission reported *inter alia* as follows:

> "We find that by reason of the discriminations asserted and set forth in our report in Jacoby vs. P. R. R. Co., 19 I. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907."

The Commission also made the following order:

> "It is ordered that the above-named defendant (Penna. R. R. Co.) be, and it is hereby authorized and directed to pay unto complainant W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Co., on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of six per cent. per annum from June 20, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission."

The Railroad Company did not comply with the order of reparation, whereupon Jacoby & Co. in due form prosecuted to trial in the District Court a petition under Section 16 of the Act to Regulate Interstate Commerce. At the trial the two reports of the Commission, including the foregoing finding and order, were admitted in evidence on behalf of Jacoby & Co., and were submitted to the jury.

The questions upon which the Circuit Court of Appeals desires instruction are these:

This being a suit for damages, under Section 16 of the Interstate Commerce Act,

(1) Were the two reports of the Commission as a whole (including the finding and the order quoted above) *prima facie* evidence of the matters therein contained?

(2) Were the finding and the order quoted above —or was either of them—*prima facie* evidence of themselves, or of itself, that the defendant had become liable to Jacoby & Co. in some amount by the discriminating practices referred to?

(3) If the finding and the order—either, or both, of them—were *prima facie* evidence that the defendant had become liable in some amount, were they—or was either of them—*prima facie* evidence also of the amount of such damage?

(Signed) GEORGE GRAY,
JOSEPH BUFFINGTON,
JOHN B. MCPHERSON,
Circuit Judges.

Feb. 26, 1914.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *sct.*
THIRD JUDICIAL CIRCUIT.

I, SAUNDERS LEWIS, JR., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Certificate of Questions to the Supreme Court of the United States in the case of Pennsylvania Railroad Company vs. W. F. Jacoby et al., No. 1755, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 12th day of
(Seal) March, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA. } *ss.*

W. F. JACOBY, being first duly sworn, says that he is one of the above petitioners; that he has read over the foregoing and annexed petition and knows well the contents thereof, and that the allegations thereof are true as he verily believes.

(Sgd). W. F. Jacoby

Sworn and subscribed to before me this 15th day of May, A. D. 1915.

(Sgd). Meyer Kraus

Commission Expires March 9, 1919.

Notary Public.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1914. No. 464.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, Co-partners, trading under the firm name of W. F. JACOBY & COMPANY,

Defendants-in-Error.

MOTION.

AND NOW, this 1st day of ~~May~~ June, 1915, come the Defendants-in-Error, above mentioned, by their counsel Wm. A. Glasgow, Jr., and move the Court to grant its writ of certiorari in the above case, directed

to the United States Circuit Court of Appeals for the Third Circuit, requiring that the whole record and cause above mentioned be sent up to this Court for its consideration, and in order that this Court may decide the whole matter in controversy in the same manner as if it had been brought up for review by writ of error or appeal.

(Sgd.) Wm. A. Glasgow, Jr.
Counsel for Defendants-in-Error.

NOTICE.

To John G. Johnson,
Attorney for the Pennsylvania Railroad Company.
Sir:

You will please take notice that on the 1st day of June, 1915, at twelve o'clock noon or as soon thereafter as counsel may be heard, the foregoing petition and motion accompanying brief will be submitted to the Supreme Court of the United States at its usual place for holding its sessions, in the Capitol at Washington, D. C., for its consideration and action, at which time and place you will please take such action in the premises as you may be advised.

(Sgd.) Wm. A. Glasgow Jr.
Counsel for Petitioners.

ADMISSION OF SERVICE.

Service of the foregoing petition, motion and brief is acknowledged this 18th day of May, 1915.

(Sgd.) John G. Johnson
Counsel for Plaintiff-in-Error.

FILED
MAY 26 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

No. [redacted] 1[redacted]22 October Term, 1914.

Pennsylvania Railroad Company,
Plaintiff-in-Error,

vs.

W. F. Jacoby and Isaac C. Weber, Co-partners, trading under the firm name of W. F. Jacoby & Company,
Defendants-in-Error.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Wm. A. Glasgow, Jr.,
Counsel for Petitioners.

Lawyers' Book Printing Company, 924 Walnut Street, Phila.

IN THE

Supreme Court of the United States.

October Term, 1914. No. 464.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, co-partners, trading under the firm name of W. F. JACOBY & COMPANY,

Defendants-in-Error.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The present proceeding is a petition for a certiorari from this Court to the United States Circuit Court of Appeals for the Third Circuit, to require that Court to send up the whole record and cause in the above case for the consideration of this Court in order that this Court may decide the whole matter in controversy in the same manner as if it had been brought into this Court for review by writ of error or appeal (Hopkins' Judicial Code, Sec. 239).

The reasons which are especially urged upon the attention of this Court are the long delay to which the

petitioners have already been subjected under the somewhat extended but necessary proceedings preliminary to establishing their claim, the fact that the questions certified to this Court have already been in effect decided in petitioners' favor by this Court, in recent decisions handed down by it in similar cases, and that the matters remaining in dispute, while readily determinable by this Court, may involve questions as to the construction of United States Statutes which would afford an opportunity for a further appeal to this Court, thus exposing the petitioners to further litigation and delay in the recovery of a claim which has already been adjudicated in their favor by the Interstate Commerce Commission and by the United States District Court for the Eastern District of Pennsylvania.

In order that this Court may fully understand the circumstances out of which this case arose, and the hardship to petitioners involved in further delay, it is proper to set forth briefly the facts.

The defendants-in-error, W. F. Jacoby and Isaac C. Weber, co-partners, trading in the coal business, under the firm name of W. F. Jacoby & Company (plaintiffs below, hereinafter called plaintiffs), were, from April 1, 1904, to October 18, 1905, engaged in operating a coal mine, known as Falcon No. 2, on a tract of bituminous coal land, situated in Bigler Township, Clearfield County, Pennsylvania, (Commission's Report, Record, p. 32).

The mine was fully equipped for operation, and on April 1, 1904, was provided with an underground electric system for hauling mine cars, had a first class wooden tipple and patent dump, an ample supply of mine cars and track facilities, and the grades favored the outward movement of loaded mine cars, and the mine was regarded as one of the best equipped mines in the District (Commission's Report, Record, p. 32).

The coal in the Falcon No. 2 mine was accepted as a very superior grade of steam coal, and was readily marketable, and was shipped to other States than Pennsylvania, in interstate commerce. In 1904 there were about 100 acres of coal remaining in the tract, (Commission's Report, Record pp. 31-32). The rated capacity of the mine made by the Pennsylvania Railroad Company, (defendant below, hereinafter called defendant), during the period from April 1st, 1904, to October 18th, 1905, as the basis of proportional car distribution, was 450 tons a day, (Record, p. 18), and the actual average output capacity of the mine was 600 tons a day (Record, pp. 19, 33). During the period from April 1st, 1904, to October 18th, 1905, the Pennsylvania Railroad Company was a common carrier and engaged in the transportation of coal in interstate commerce, and, for the purpose of making a pro rata distribution of cars to mines in the coal fields, it divided its coal territory into Coal Districts served by the Divisions of its Railroad (Record, p. 94), in one of which Coal Districts, known as the Clearfield District, served by the Tyrone Division, the Falcon No. 2 mine was situate. On the same Division and in the same Coal District, there were a number of other mines, belonging to the Berwind-White Coal Mining Company, the Lehigh Valley Coal Company and other mine operators, competing with Jacoby & Company. The mines of the Lehigh Valley Coal Company were on a different branch of the Pennsylvania Railroad, known as the Snowshoe Branch, but were in the same Coal District and on the same Tyrone Division; these mines paid the same rates, and were carried on the same car distribution sheet as Falcon No. 2, (Record, pp. 94, 97, 99, 106). During the period from April 1st, 1904, to October 18th, 1905, the Falcon No. 2

mine, though in operation and demanding cars continually, received far less car service than its rated capacity entitled it to, and also far less car supply than was given by the Pennsylvania Railroad Company during the same period to other mines in the same Coal District and on the same Division above mentioned, of a similar or lower rated capacity and with similar or inferior facilities for mining and loading coal, and was thereby prevented from mining and shipping coal which it was entitled to ship to fill its contracts, and from accepting other available and profitable contracts, and from obtaining and fulfilling other contracts which it could have obtained and fulfilled.

In consequence thereof, the Falcon No. 2 mine was greatly hampered; its employes were forced to leave and seek other employment, and its cost of operation per ton materially increased. Jacoby & Company's business also suffered by reason of inability, due to car shortage, to accept or promptly fulfill contracts at Falcon No. 2 mine, and in October, 1905, they were obliged to go out of business and sell the mine.

On the —— day of June, 1907, the plaintiffs (defendants-in-error here) filed a complaint with the Interstate Commerce Commission, averring that the Pennsylvania Railroad Company, the defendant, (plaintiff-in-error here) had been guilty of unjust and unlawful discrimination against plaintiffs and in favor of other coal operators in the Clearfield District and on the Tyrone Division, in the distribution of coal cars, during the period from April 1, 1904, to October 18, 1905, and had also been guilty of other unjust and unlawful discriminatory practices against plaintiffs in distributing coal cars among its several Divisions, to the prejudice of the Tyrone Division and to the plaintiffs as coal operators and shippers on such Division.

The complaint was duly investigated and heard by the Commission, and on March 7, 1910, the Commission filed a report (Record, p. 31), finding that the defendant had been guilty of unjust and unlawful discrimination, in violation of the Act to Regulate Commerce, in both the respects charged.

On page 64 (Record), the Commission found:

> "But Falcon No. 2 was not placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal car equipment during the period of this action." (Record, p. 64.)

And in referring to the "special allotment of 500 cars daily" to the Berwind-White Coal Mining Company, which took that number of cars out of the equipment for pro rata distribution to the Tyrone Division, the Commission finds (Record, p. 64):

> "We see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district."

And the Commission further found, (Record, p. 65):

> "For the reasons explained at some length in that case" (Hillsdale Coal & Coke Co. vs. P. R. R. Co.), "those rules" (referring to the rules complained of by Jacoby & Company) "operated as an undue discrimination against these complainants, and we so find. But for the present and for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants leaving for de-

termination after further argument the question of the extent to which the complainants may have been damaged thereby."

And on the same day, to wit, March 7, 1910, the Commission issued an order, (Record, p. 36), in which the nature of the practices complained of on the Tyrone Division were set forth, and it was

> "*Ordered*, that the said rule, regulation and practice of the defendant in that behalf unduly discriminate against the complainants and other coal operators similarly situated, and is in violation of the third section of the Act to Regulate Commerce." (Record, pp. 37, 66.)

The order then requires the defendant to cease and desist "from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them."

The question of "damages claimed by the complainants" was deferred by the order, "pending further argument in the premises".

Subsequently, on March 11, 1912, the Commission filed a Supplemental Report (Record, p. 14), which contained the further findings of the Commission as to the complaint of Jacoby & Company (Record, p. 18). In this Supplemental Report the Commission found:

1. "We find that by reason of the discriminations ascertained and set forth in our report in Jacoby vs. P. R. R. Co., 19 I. C. C. 392, the complainants *were dam-*

aged to the extent of $21,094,39, *which they are entitled to recover with interest from June* 28, 1907." (Italics ours.)

2. "(a) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day."

3. "(b) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days, and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days."

4. "(c) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods."

5. "(d) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine, with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures *the loss on the tonnage which the complainant was unable to ship.*" (Italics ours.)

6. "(e) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period,

making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based *on a fair car supply*, as heretofore stated. This is the *basis* adopted for computing *the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.*" (Italics ours.)

The Commission then finds that the complainants sold their mine and realized a profit of $7,500 over the purchase price which they had paid, but the Commission does not undertake to say that this amount or any part of it should be deducted from the amount of reparation awarded.

On the same day, to wit, March 11, 1912 (Record, p. 26), the Commission entered its order, making its original report and supplemental report a part thereof, in which it "authorized and directed" the defendant, Pennsylvania Railroad Company, "to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, *as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.*" (Italics ours.)

The time within which the Commission ordered the defendant to pay to the plaintiffs the amount which they were found to have been damaged having expired, the plaintiffs availed themselves of the statutory proceedings provided by Section 16 of the Act to Regulate Commerce, and filed a petition in the District Court of the United States for the Eastern District of Pennsyl-

vania, "setting forth briefly the causes for which he claims damages and the order of the Commission in the premises," and praying the Court to enter a judgment in their favor against the defendant for the amount which plaintiffs had been damaged, as set forth in the reports and orders of the Commission which were filed with the petition as a part thereof.

This was the "petition" which by Section 16 of the Act is spoken of as "a petition *for the enforcement of an order for the payment of money*," and which is required to "be filed in the Circuit Court or State Court within one year from the date of the order, and not after."

A demurrer was filed by the defendant to the petition on September 18, 1912, and on the 12th of November, 1912, the Court handed down an opinion, overruling the demurrer; the defendant pleaded "not guilty," and on the 3d of March, 1913, the cause was tried by a jury. On the trial of the cause the plaintiffs, Jacoby & Company

1. Offered in evidence the original report of the Interstate Commerce Commission, finding that the defendant had been guilty of unjust discrimination against the plaintiffs, and read to the jury only the pertinent part of said report (Record, pp. 61 to 65, inclusive). This report was offered for the purpose of showing that the Commission had found that the rules of car distribution which were put into effect and maintained by the defendant during the period covered by the complaint, unjustly discriminated against the plaintiffs, in violation of Section 3 of the Act.

2. Offered in evidence the supplemental report of the Commission as to discrimination, and the fact and

amount of damage suffered by the plaintiffs. (See Record, pp. 67-68.)

3. Offered in evidence the order of the Commission requiring the defendant to pay to the plaintiffs the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 20, 1907, "as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports."

The plaintiffs then showed that no part of the award of the Commission had been paid, and that the report and supplemental report of the Commission and its two orders were duly served upon the Pennsylvania Railroad Company.

The defence contended that the reports and findings of the Commission were not entitled to be received or admitted in evidence. The defence also offered in evidence certain data showing the number of privately owned cars of shippers and the number of fuel cars of the defendant and of other railroad companies in the Tyrone Division and contended that defendant had received the full quota of cars to which they were entitled. The Court charged the jury (Record, p. 124) in part as follows:

> "The Commission has decided the manner of distribution of coal cars, and that is a question with which you have nothing to do. Their findings on that subject are conclusive, as far as this Court and jury are concerned." (Record, p. 127.)

And further:

> "The Commission's findings of fact you have heard read, and they find among other things that

the practices employed in the distribution of coal cars in this particular case were unjust and discriminatory." (Record, p. 125.)

And further, the Court charged the jury that the finding of the fact and amount of damages which the plaintiffs had suffered, by reason of the unlawful discrimination of the defendant, was *prima facie* correct, and "it is entitled to weight with you as being correct on its face, unless the defendant has produced evidence to show that some other state of facts existed, and that the plaintiffs have not suffered the damages which the Commission has awarded to them." (Record, p. 127.)

Thereupon, the jury, on the 4th day of March, 1913, found a verdict in favor of the plaintiffs, and assessed their "damages in the sum of $28,572.54." The defendant moved to set aside the verdict and for judgment *non obstante veredicto,* both of which motions were overruled by the Court (Record, p. 142), and on the 19th of May, 1913, the Court entered judgment for plaintiffs and also entered an order under Sections 8 and 16 of the Act to Regulate Commerce, directing that counsel for plaintiffs be allowed a counsel fee of $2500 for services in the proceeding before the Interstate Commerce Commission, and a further fee of $2500 for services in the proceeding in the District Court, to which allowances an exception was granted (Record, p. 142).

To reverse this judgment a writ of error was sued out, based upon a number of assignments of error (Record, pp. 145-155), which, however, reduce themselves to several main matters:

(1) What was the standing and effect of the reports and findings of the Commission as evidence in the District Court?

(2) Should the Court, in view of the evidence presented, have taken the case from the jury, or instructed them that the plaintiffs' evidence was completely rebutted and that plaintiffs were not entitled to recover the amount claimed?

(3) What counsel fees could properly be awarded by the District Court in this case?

All these matters were matters depending primarily upon the construction of United States statutes.

The first of these matters had been before the Circuit Court of Appeals for the Third Circuit in the cases of *Meeker, surviving partner, &c. vs. Lehigh Valley R. R. Co.* and *Meeker vs. Lehigh Valley R. R. Co.* (reported 211 Fed., 785), and the Court of Appeals in the above cases had, on very similar facts, reversed a judgment of the District Court. However, the Circuit Court of Appeals certified to this Court the questions set forth in the certificate filed with the petition in this case for certiorari (see Petition, p. 8 et seq.), as follows:

(1) Were the two reports of the Commission as a whole (including the finding and the order quoted above) *prima facie* evidence of the matters therein contained?

(2) Were the finding and the order quoted above —or was either of them—*prima facie* evidence of themselves, or of itself, that the defendant had become liable to Jacoby & Co. in some amount by the discriminating practices referred to?

(3) If the finding and the order—either, or both, of them—were *prima facie* evidence that the defendant had become liable in some amount, were they—or

was either of them—*prima facie* evidence also of the amount of such damage?

This Court filed its opinion in the Meeker cases (reported 236 U. S. 412, 434), which had been brought up by certiorari, in which this Court in effect decided in petitioners' favor the very points certified to it in this case. At the same time, this Court passed adversely to the granting of counsel fees for services rendered before the Interstate Commerce Commission.

The only questions remaining, therefore, to be determined are questions arising upon the refusal of the trial court to affirm certain points presented by the defendant, and upon certain parts of the charge of the Court to the jury. As the case, however, arose under the provisions of the Act to Regulate Commerce and the charge and requests for charge naturally bore upon the construction of that Act, these matters might afford ground, after the answer of this Court to the questions here certified and an adjudication had by the Circuit Court of Appeals, for a further appeal to this Court.

It is submitted that a grave hardship would be inflicted upon petitioners by requiring them to again take their place upon the list of the Circuit Court of Appeals, to abide a decision in that Court, and thereafter to await the determination of a further appeal to this Court upon matters which could be now readily determined by this Court. In 1905 these petitioners were injured and virtually forced out of business by the acts of the defendant, and they have now waited nearly ten years to secure the reparation to which the Interstate Commerce Commission and a jury have both held that they were entitled. The case seems to be one which would peculiarly meet the reason of the Rule of this Court providing for a certification of the whole record here for final determination. There

could be no hardship to defendant in such certification, for unless defendant seeks delay for the sake of delay, it would be equally concerned to secure an end to litigation which has already extended over eight years.

If this cause should take the ordinary course, the petitioners, if finally successful, may be delayed in obtaining the reparation to which they conceive themselves justly entitled, for several years, while should the cause for any reason be decided adversely and the case remitted for a new trial, there is no method of arriving at the length of further delay before the final adjudication of the cause.

The petitioners' business was destroyed and they themselves practically ruined by the acts of the defendant. In the case of one of them the litigation is being conducted by a committee of creditors. Every delay to which they are subjected exposes them to a grievous disadvantage and to expense and trouble for which they cannot be compensated in costs. All the matters of defence available to their suit are in the record, their counsel having refrained from objection to any evidence offered by defendant on the trial of the case. The issues presented are few and clear, and can be now readily adjudicated.

It is therefore earnestly submitted that the case is one which invokes the recognized powers of this Court to hear and consider all the matters involved thereon as if on writ of error or appeal, and that this Court should grant the order prayed and finally determine the right of the petitioners to the award made in their favor by the Interstate Commerce Commission in March, 1912, and the verdict rendered in their favor for the same amount in March, 1913.

Wm. A. Glasgow, Jr.,
Counsel for Petitioners.

FILED
MAY 26 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

October Term, 1914. No. 464. 1382

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, Co-partners, trading under the firm name of W. F. JACOBY & COMPANY,

Defendants-in-Error.

MOTION TO ADVANCE.

W. F. Jacoby and Isaac C. Weber, the petitioners herein, move the Court to advance this cause upon the docket for final hearing, for the following reasons:

That the matter to be herein determined is a case, arising under the Act to Regulate Commerce, to enforce the payment of an award made against the defendant in favor of the petitioners in the sum of $21,094.39, with interest thereon at the rate of six per cent. per annum from June 28, 1907, for certain unjust and unlawful discriminatory practices found by the Interstate

Commerce Commission to have been used and committed by Pennsylvania Railroad Company, plaintiff-in-error, a common carrier engaged in interstate commerce, to the damage of petitioners, who were shippers of coal upon the line of said railroad carrier during the period from April 1, 1904, and October 18, 1905, when said practices were in force. That the original petition was filed with the Interstate Commerce Commission in June, 1907, and the final award was made by the Commission on March 11, 1912, and that suit was brought on said award by petition filed on July 19, 1912, and that judgment was rendered on a verdict in favor of petitioners, in the sum of $28,572.54, being the amount of said award, on May 21, 1913.

That by reason of unavoidable delay, said cause has been pending before the Interstate Commerce Commission and in the Courts of the United States since June, 1907. That if this cause shall take its ordinary course, considerable time may yet elapse before petitioners may be able to obtain a final judgment upon said award.

That the chief matters in question in the cause were certified to this Court from the United States Circuit Court of Appeals for the Third Circuit, on February 26, 1914, and are now before this Court. That these questions were in effect decided in favor of petitioners in certain recent decisions of this Court, in which the same points came before the Court for adjudication in cases brought upon writ of error from the United States Circuit Court of Appeals for the Third Circuit.

That the subsidiary questions arising in the case are matters involving the construction of the Act to Regulate Commerce and other acts of Congress.

That the facts are admitted upon the record, which

this Court has been, by petition, requested to have brought before it for final determination as if on appeal or writ of error.

That counsel are, on both sides, fully prepared, by reason of having presented their argument heretofore to the Honorable Judges of the Circuit Court of Appeals for the Third Circuit, to present this cause fully without requiring the usual time for the preparation of new briefs.

That by reason of the peculiar circumstances above detailed, petitioners move the Court to advance this cause to such early hearing as may be convenient to this Honorable Court.

WM. A. GLASGOW, JR.,
Counsel for Petitioners.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1914. No. 464.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, Co-partners, trading under the firm name of W. F. JACOBY & COMPANY,
Defendants-in-Error.

NOTICE.

To JOHN G. JOHNSON,
Attorney for the Pennsylvania Railroad Company.
Sir:

You will please take notice that on the ..1st.. day of ....January...., 1915, at twelve o'clock noon or as soon thereafter as counsel may be heard, the foregoing Motion will be submitted to the Supreme Court of the United States at its usual place for holding its sessions, in the Capitol at Washington, D. C., for its consideration and action, at which time and place you will please take such action in the premises as you may be advised.

(Sgd.) Wm. A. Glasgow, Jr.
Counsel for Petitioners.

ADMISSION OF SERVICE.

Service of the foregoing Motion is acknowledged this .....18th..... day of .....May....., 1915.

(Sgd.) John G. Johnson
Counsel for Plaintiff-in-Error.

No. [redacted]22

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IN THE

Supreme Court of the United States.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

W. F. JACOBY & COMPANY,
Defendant in Error.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Plaintiff in Error.

INDEX.

PAGE

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 7

ARGUMENT 17

Evidence adduced by defendants in error insufficient to establish a *prima facie* case 17

Even if the reports of the Commission established a *prima facie* case, evidence adduced by plaintiff in error established that the defendants in error were not entitled to the cars which the Commission held they should have received 23

Number of cars to which the defendants in error were entitled should have been ascertained with reference to the rule of distribution in force during the period of the action, and not with reference to a rule subsequently promulgated by the Interstate Commerce Commission 38

Reports and orders of the Commission as a whole wrongly admitted in evidence 44

LIST OF CASES REFERRED TO.

Anadarko Cotton Oil Company *vs.* Atchison, Topeka & Santa Fe Railway Company, 20 I. C. C. Rep. 43 49

Atchison, Topeka & Santa Fe Railway Company, Anadarko Cotton Oil Company *vs.*, 20 I. C. C. Rep. 43 49

Clark Brothers Coal Mining Company, Pennsylvania Railroad Company *vs.*, U. S. . Decided June 21st, 1915. (Not yet reported.) 43

Hillsdale Coal & Coke Company *vs.* Pennsylvania Railroad Company, 19 I. C. C. Rep. 356 37

International Coal Mining Company, Pennsylvania Railroad Company *vs.*, 230 U. S. 184 38

Lehigh Valley Railroad Company, Meeker *vs.*, 236 U. S. 412 21

Meeker *vs.* Lehigh Valley Railroad Company, 236 U. S. 412 21

Morrisdale Coal Company *vs.* Pennsylvania Railroad Company, 230 U. S. 304 .. 42

Pennsylvania Railroad Company *vs.* Puritan Coal Mining Company, U. S. . Decided April 5th, 1915. (Not yet reported.) 36, 38

Pennsylvania Railroad Company, Hillsdale Coal & Coke Company *vs.*, 19 I. C. C. Rep. 356 37

Pennsylvania Railroad Company *vs.* International Coal Mining Company, 230 U. S. 184 38

Pennsylvania Railroad Company *vs.* Puritan Coal Mining Company, 237 Penna. St. Rep. 420 40

Pennsylvania Railroad Company, Morrisdale Coal Company *vs.*, 230 U. S. 304 .. 42

Pennsylvania Railroad Company *vs.* Clark Brothers Coal Mining Company, U. S. . Decided June 21st, 1915. (Not yet reported.) 43

Puritan Coal Mining Company, Pennsylvania Railroad Company *vs.*, U. S. . Decided April 5th, 1915. (Not yet reported.) 36, 38

Puritan Coal Mining Company, Pennsylvania Railroad Company *vs.*, 237 Penna. St. Rep. 420 40

In the Supreme Court of the United States.

OCTOBER TERM, 1915. NO. 139.

Pennsylvania Railroad Company, Plaintiff in Error,

vs.

W. F. Jacoby & Company, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

STATEMENT OF THE CASE.

The present action was instituted by the defendants in error in the District Court of the United States for the Eastern District of Pennsylvania to recover the amount of an award made in their favor by the Interstate Commerce Commission.

In the period between April 1, 1904, and October 15, 1905, the defendants in error had been the owners and operators of a mine, the output of which was shipped over

the railroad of the plaintiff in error. In this period the plaintiff in error had made a *pro rata* or percentage distribution of its cars among the mines located on its road, and the defendants in error, conceiving that they had not received the number of cars which they were entitled to, instituted a proceeding in July, 1907, before the Interstate Commerce Commission which eventuated in the award upon which the present action was based.

In October, 1905, the defendants in error had sold their mine, and consequently in the proceeding before the Commission no order was sought which would regulate or define the method of car allotment and distribution to be thereafter pursued by the plaintiff in error; the power of the Commission was invoked for the purpose merely of securing an award because of the non-receipt of cars which the defendants in error claimed they would have received had a proper system of distribution been pursued by the plaintiff in error during a period of time which had terminated a year and nine months prior to the commencement of the proceeding.

The Commission first determined what system of distribution should have been pursued in the period in question, and then found that if this system had been pursued the defendants in error would have received as their share of those available for distribution in such period, cars which would have enabled them to ship in the first year of the period, viz., from April 1, 1904, to April 1, 1905, 74,126.25 tons, and in the balance of the period, that is, between April 1, 1905, and October 15, 1905, 37,078.65 tons. These amounts were, respectively, 59.9 per cent. and 59.6 per cent. of the mine's shipping capacity, as determined by the rating given to it by the plaintiff in error and confirmed by the Commission as fair.

The reports and orders of the Commission failed to disclose what was the basis of the Commission's conclusion that in the two periods named the defendants in error should have received cars of a capacity equal to the above percentages of their mine's rated capacity.

It was established by the testimony that the aggregate capacity of the cars of all classes placed at the mines located in the Region in which the defendants in error's mine was located—the Tyrone Region—had been equal in the period between April 1, 1904, and April 1, 1905, to 30.3 per cent. of the rated capacity of the mines, and in the period between April 1, 1905, and October 15, 1905, to 23.9 per cent. of such capacity.

The cars placed at the mines in the Tyrone Region comprised 25,474 so-called "fuel" cars of the plaintiff in error, which had been placed at the mines from which it was drawing its fuel supply, 33,539 individual or private cars, which had been placed at the mines of the owners of the cars, and 53,454 cars available for distribution among all shippers. Treating all of these cars as distributable, and ignoring the consideration that a large number of them were cars which had to be placed at the mines of their owners, and that a large number were fuel cars which could lawfully be placed at the mines which were furnishing fuel coal to the plaintiff in error, each mine in the Region, had all these cars been distributed, would have received cars, equal in capacity to the percentages above given, viz., 30.3 per cent. and 29.3 per cent. of its rated capacity.

While the Commission did not indicate how it had reached the conclusion that the defendants in error should have reached in these same periods 59.9 per cent. and 59.6 per cent of their mine's rated capacity, the basis for this conclusion was established upon the trial of the case, and it was this:—

The records of the plaintiff in error, showing the distribution made by it of its cars, referred to in the testimony as its "Car Distribution Sheets," had been submitted to the defendants in error for their examination.

The defendants in error had selected a relatively small number of the total number of mines located in the Region—about 20 out of a total of about 150—whose shipments in the earlier period, amounted to about 40

per cent. and in the later period, to about 35 per cent. of the total Region shipments, and had prepared an exhibit which showed that in the two periods in question the average of the shipments from these mines had amounted to 59.9 per cent and 59.6 per cent. respectively of their aggregate ratings, and this exhibit was submitted to the Commission as embodying the defendants in error's claim as to the percentage of their mine's aggregate ratings which they ought to have received cars for.

The cars shown by this exhibit to have been placed at the mines embraced therein included cars of all classes, as well those which were distributable as those which were not, due to the fact that they were individual or fuel cars. The exhibit did not disclose how many were individual or fuel cars, but it was established by the testimony that the cars placed at the only mines as to which any attempt had been made to establish preferred treatment—those of the Berwind White Coal Mining Company—had been substantially all fuel or individual cars. The exhibit showed that in the period between April 1, 1904, and April 1, 1905, 13,452 cars had been placed at these mines, and of these all but 460 had been either fuel or individual cars, and in the later period out of 7154 cars placed, all had been fuel or individual cars with the exception of 60.

The Commission allowed as damages the profit which the defendants in error would, in the judgment of the Commission, have realized from the sale of the additional coal which, under the Commission's theory, they should have received cars for the shipment of, and also the enhanced cost of producing that which they had mined and sold, due to the curtailment of the mine's output as the result of the non-receipt of additional cars. The damages, ascertained in the manner indicated, were computed by the Commission at $21,094.39, and this amount, with interest, the plaintiff in error was directed to pay.

As already stated, the defendants in error had after the close of the period of the action sold their mine, and

had thus realized something for the coal which they had been prevented from shipping due to lack of cars for the shipment of the same. It was contended that this fact should be taken into consideration in determining the extent of the loss sustained by the defendants in error, due to their inability to dispose of the coal in the period of the action. This contention was thus disposed of by the Commission:

> "We further find that the Complainants in the sale of their mine realized a profit of $7500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded."

The award not having been paid, the present action r the recovery of the same was instituted.

To the petition filed by the defendants in error a demurrer was interposed which challenged the right of the Commission to make the award upon the ground that jurisdiction to award damages in other than rate cases had not been conferred upon that body. This demurrer was based upon a view of the Commission's powers which was in accordance with that held by a majority of the Commission itself. The District Court, however, overruled this demurrer.

Upon the trial the defendants in error, over the objection of the plaintiff in error, put in evidence and read to the jury the reports of the Commission and the orders made thereon. The objection of the plaintiff in error to the admission of these reports and orders was based upon the fact that they contained not mere findings of fact, but arguments, conclusions of law and other extraneous matters hurtful to the plaintiff in error.

No other testimony except some purely formal evidence was introduced by the defendants in error.

The plaintiff in error offered in evidence the evidence and exhibits before the Commission. Objection, however,

was made to the admission of these, and they were excluded by the trial Judge. Subsequently, however, the exhibits which have been already referred to were admitted in evidence, and other testimony was introduced for the purpose of establishing what had been the Region distribution of cars in the period of the action.

Upon the case as thus made up the plaintiff in error contended that the Commission had not jurisdiction to make the award; that the award as disclosed by the order of the Commission was for a sum which the Commission had not found was due and owing by the plaintiff in error; and that the Commission had used an erroneous method for determining the percentage of their mine's rating which the defendants in error should have received in the period of the action, as this should have been determined with reference, not to the percentage of certain mines, but with reference to the region percentage.

The Court overruled these contentions, so far as they related to the validity and effectiveness of the Commission's award, sustained the contention that the defendants in error's percentage was to be ascertained with reference to the region percentage, but declined to instruct the jury that the Commission's percentages were, therefore, erroneous, and this even though the jury should find that these percentages were determined with reference not to the region percentage of distribution, but with reference to the number of cars which had been received by certain mines selected for the purposes of the case by the defendants in error from all those which were comprised in the region.

The jury rendered a verdict for the full amount of the award with interest. Thereafter application was made to the Court for an allowance of counsel fees to counsel for the defendants in error, both for services rendered upon the trial in the Court below and in the proceeding before the Commission. Objection was made on behalf of the plaintiff in error to the allowance of any counsel fees for services before the Commission,

and to the allowance of a larger sum for services before the Court than $500.

The Court allowed $2500 for services in the proceeding before the Commission and a like sum for services in the lower Court.

ASSIGNMENTS OF ERROR.

I.

The learned trial Judge erred in admitting in evidence the Report of the Interstate Commerce Commission of May 7, 1910, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, *vs.* The Pennsylvania Railroad Company, No. 1139.

II.

The learned trial Judge erred in admitting in evidence the Order of the Interstate Commerce Commission of May 7, 1910, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, *vs.* The Pennsylvania Railroad Company, No. 1139.

III.

The learned trial Judge erred in admitting in evidence the Supplemental Report of the Interstate Commerce Commission of March 11, 1912, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, *vs.* The Pennsylvania Railroad Company, No. 1139.

IV.

The learned trial Judge erred in admitting in evidence the Supplemental Order of the Interstate Commerce Commission of March 11, 1912, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, *vs.* The Pennsylvania Railroad Company, No. 1139.

V.

The learned trial Judge erred in refusing to admit in evidence the testimony and exhibits appearing in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, *vs.* The Pennsylvania Railroad Company, before the Interstate Commerce Commission, No. 1139.

VI.

The learned trial Judge erred in refusing to affirm the first point submitted by the defendant, as follows:—

> "1. The Interstate Commerce Commission was without authority to make the award upon which the action is based, as its jurisdiction does not extend to the consideration and adjudication of claims for damages or reparation of the character of that embraced in the present action. The plaintiffs, therefore, are not entitled to recover, and the verdict must be for the defendant."

VII.

The learned trial Judge erred in refusing to affirm the second point submitted by the defendant, as follows:—

> "2. The award made by the Commission is invalid because there was left open for further consideration the question whether the whole amount awarded was properly payable to the plaintiffs."

VIII.

The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:—

> "3. To justify the Commission in making the award for the recovery of which this action has been brought, it must have been shown or established to its satisfaction by the evidence adduced before it that the plaintiffs had not received their proper share of

the cars placed by the defendant, in the distribution of which the plaintiffs were entitled to participate, and which were used for interstate commerce or transportation. It appears that no evidence was presented to the Commission bearing upon this point, and that the award of the Commission was based upon the theory that whether the plaintiffs had been subjected to discrimination forbidden by the Interstate Commerce Act was to be determined by ascertaining whether they had received their proper share of all cars in the distribution of which they were entitled to participate, and not merely their share of the cars used for interstate commerce or transportation. The award consequently was invalid, and the plaintiffs are not entitled to recover."

IX.

The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:—

"4. The award of the Interstate Commerce Commission is based upon the conclusion that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings for 275 days, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine rating for 138¼ days. It is apparent that this conclusion of the Commission was based upon the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have

been placed at the plaintiffs' mine, the basis for the Commission's award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

X.

The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant as follows:—

"5. It has been affirmatively established by the evidence adduced upon the part of the defendant that if distribution had been made of its cars in accordance with the method prescribed by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9 per cent. of the rating of their mine, and in the period between April 1, 1905, and October 18, 1908, cars equal in capacity to 59.6 per cent. of the rating of their mine. As the award of the Commission was based upon the theory that cars equal in capacity to these percentages should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover."

XI.

The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant, as follows:—

"6. It appears that there were included in the cars placed at the mines which the plaintiffs' testimony tended to show had received cars equal in capacity to 59.9 per cent. and 59.6 per cent. in the two periods of the aggregate of their mines' rating, individual or private cars of shippers, fuel cars of the defendant, and fuel cars of other railroad companies. The plaintiffs were not entitled to participate in the distribution of cars of either of these three classes, and consequently the percentages which those selected mines received should

not have been used as the basis for ascertaining the number of cars which the plaintiffs should have received, even upon the assumption that the number of cars placed at these selected mines furnished the standard by which the number should be ascertained which the plaintiffs should have received. The adoption, therefore, by the Interstate Commerce Commission of the percentages received by these mines as the standard for the ascertainment of the number which the plaintiffs should have received was an error, and the award made in favor of the plaintiffs was consequently invalid."

XII.

The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, as follows:—

"7. Under the law and the evidence the plaintiffs are not entitled to recover, and your verdict should be for the defendant."

XIII.

The learned trial Judge erred in refusing to affirm the eighth point submitted by the defendant, as follows:—

"8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those com-

prised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9 per cent, and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

XIV.

The learned trial Judge erred in refusing to affirm the ninth point submitted by the defendant, as follows:—

"9. If the jury find that if the defendant had made distribution of its cars in accordance with the method prescribed as proper by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9 per cent of the rating of their mine, and in the period between April 1, 1905, and October 18, 1905, cars equal in capacity to 59.6 per cent. of the rating of their mine, and that the award of the Commission was based upon the theory or conclusion that cars equal in capacity to these percentages, respectively, should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover."

XV.

The learned trial Judge erred in refusing to affirm the tenth point submitted by the defendant, as follows:—

"10. The rating for purposes of car distribution given by the defendant to the plaintiff's mine was 450 tons a day, the equivalent of 18 cars. This was a fair and proper rating, and subjected the plaintiffs to no undue or unjust discrimination."

XVI.

The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:—

"11. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 232,517 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 66,504. The cars thus delivered were, therefore, equal to 28.5 per cent. of the ratings. That in this same period the plaintiffs received cars equal to 28 per cent. of their mine's rating. Had they received cars equal to the region rating, viz., 28.5 per cent., they would have received additional cars equal to 00.5 per cent. of the aggregate of their mine's rating, and as this was 4301 cars, they would have received 22 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region) regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XVII.

The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:—

"12. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 152,934 cars, and that the cars of all classes delivered by the defendant at those mines aggregated 45,963 The cars thus delivered were, therefore, equal to 30.1 per cent. of the ratings. That in this same period the plaintiffs received cars equal to 23.9 per cent. of their mine's rating. Had they received cars

equal to the Region rating, viz., 30.1 per cent., they would have received additional cars equal to 6.2 per cent. of the aggregate of their mine's rating, and as this was 2346 cars, they would have received 146 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of those cars they were not entitled to participate."

XVIII.

The learned trial Judge erred in refusing to affirm the thirteenth point submitted by the defendant, as follows:—

"13. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region (including those in the Snow Shoe Region) aggregated 255,617 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 77,430. The cars thus delivered were, therefore, equal to 30.3 per cent. of the rating. That in this same period the plaintiffs received cars equal to 28 per cent. of their mine's rating. Had they received cars equal to the region rating, viz., 30.3 per cent, they would have received additional cars equal to 2.3 per cent. of the aggregate of their mine's rating, and as this was 4301 cars, they would have received 98 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, and if they had been entitled to their *pro rata* share of

all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XIX.

The learned trial Judge erred in refusing to affirm the fourteenth point submitted by the defendant, as follows:—

"14. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region (including those in the Snow Region) aggregated 166,434 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 49,834. The cars thus delivered were, therefore, equal to 29.9 per cent. of the ratings. That in this same period the plaintiffs received cars equal to 23.9 per cent. of their mine's rating. Had they received cars equal to the region rating, viz., 29.9 per cent., they would have received additional cars equal to 6 per cent. of the aggregate of their mine's rating, and as this was 2348 cars, they would have received 141 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XX.

The learned trial Judge erred in refusing to affirm the nineteenth point submitted by the defendant, as follows:—

"19. The damages, if any, sustained by the plaintiffs consequent upon their liability to mine and ship an additional amount of coal, cannot properly be measured by the estimated profit which would have accrued to them on such additional output. As the plaintiffs have presented no evidence from which the jury can ascertain or measure the damages upon any other basis, the recovery must be confined to nominal damages."

XXI.

The learned trial Judge erred in refusing to affirm the twentieth point submitted by the defendant, as follows:—

"20. There is no evidence that would warrant the jury in finding that the plaintiffs, under the theory of distribution prescribed as proper by the Interstate Commerce Commission, were entitled the period of the action, to any more cars than they received, because no evidence has been presented which would warrant the jury in finding that the plaintiffs had received in this period fewer cars than they were entitled to if in arriving at the number of cars for distribution among shippers generally, there were to be excluded the private or individual cars of shippers, the fuel cars of the defendant, and the fuel cars of other Railroad Companies consigned by them to certain mines."

XXII.

The learned trial Judge erred in refusing the defendant's motion for judgment *non obstante veredicto* upon the whole record.

XXIII.

The learned trial Judge erred in allowing a counsel fee for the services of the plaintiff's counsel in the proceeding before the Interstate Commerce Commission.

XXIV.

The learned trial Judge erred in allowing a counsel fee of $2500 for the services of the plaintiffs' counsel before the Interstate Commerce Commission.

XXV.

The learned trial Judge erred in allowing a counsel fee of $2500 for the services of the plaintiffs' counsel before the learned trial Court.

XXVI.

The learned trial Judge erred in entering judgment in favor of the plaintiffs, against the defendant, upon the verdict of the jury.

ARGUMENT.

Evidence Adduced by Defendants in Error Insufficient to Establish a *Prima Facie* Case.

The defendants in error, in order to maintain their right to recover, were required to establish by competent proof all facts necessary to support their right to the damages claimed by them.

The Interstate Commerce Act enabled them to avail themselves for this purpose of any competent findings of fact by the Interstate Commerce Commission, and in the present case the defendants in error relied solely upon the reports and orders of the Commission for the facts necessary to establish a *prima facie* case.

It was and is our contention that these reports and orders of the Commission did not embody the facts necessary to establish a *prima facie* case.

This contention is rested upon the proposition that nowhere in these reports or orders will be found any findings by the Commission of the facts essential to the

ascertainment of the number of cars which the defendants in error would have received had the rule of distribution been followed which the Commission by its order prescribed as the one which should have governed the plaintiff in error in making distribution of its cars.

It will not of course be denied that it was incumbent upon the defendants in error to establish what number of cars they should have received in the period covered by their claims. Several factors entered into the ascertainment and determination of this question. The capacity of the defendants in error's mine was one. This the Commission determined. The number of days on which it worked or could have worked was another. This the Commission also determined. But other and most essential facts were not established by any findings of the Commission. Thus, the Commission did not find what number of cars the plaintiff in error had available for distribution and the percentage of these which the defendants in error were entitled to, having regard to the capacity of their mine, and the capacity of the other mines which were entitled to share with them in the distribution of the available cars.

The claim of the defendants in error was that they had not received the percentage which they ought to have received of the cars which the plaintiff in error had available for distribution in the period of the action. Manifestly it would seem that it was incumbent upon them, therefore, to establish both the number which were thus available and the proportion or percentage thereof, which, having regard to the capacity of their mine, they should have received. But the Commission nowhere found what number of cars the plaintiff in error distributed in the Region in which the defendants in error's mine was located, what number of these were available for allotment and distribution among shippers generally, nor what the relation was between the capacity of the defendants in error's mine and the capacity of all the mines in the Region, all of which facts were not only important, but essential in arriving at any

determination as to the number of cars which the defendants in error should have received.

In the report of the Commission which embodies its conclusions as to the damages which should be awarded the following statement is contained:—

> "That during the first of these periods"—the Commission divided the period of the claim into two periods for its own convenience—"38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods." (Transcript of Record, page 18.)

The extract just quoted contains everything that can be found in the reports or orders of the Commission which has any bearing upon the question which was the important one, viz., what number of cars should the defendants in error have received.

The Interstate Commerce Act, while authorizing actions of the character of the present one, requires that they "shall proceed in all respects like civil suits for damages, except that on the trial of such suit the reports and orders of the Commission shall be *prima facie evidence of the facts therein stated.*"

It results from this that the plaintiff or petitioner in such an action as the present one is not relieved from the burden of proving every fact which in an action of law for damages he would be required to prove.

If the petitioners or defendants in error in the present action had elected to bring an action in the Federal Court to recover damages sustained because of the non-delivery to them of their proportion or percentage of the plaintiff in error's cars, can there by any doubt that it would have

unjustly discriminatory rates charged for the transportation of anthracite coal * * * which rates so charged have been found by this Commission to have been unjustly discriminatory," and a further amount "as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal * * * which rates so charged have been found by this Commission to have been unreasonable."

It will be observed that these orders are similar, in effect, to the order of the Commission in the present case, in that they direct the payment of a certain sum as reparation for unlawful rates charged the complainant, while in the present case the plaintiff in error was directed to pay a sum as reparation for unlawful discrimination in the distribution of its coal cars.

If, therefore, the order in the present case makes out a *prima facie* case for the defendants in error, the orders in the Meeker case should have been given the same effect, and yet this Court, impliedly, at least, refused to give such effect to the orders, for in sustaining the contention that the reports and orders together made out a *prima facie* case for Meeker it rested its conclusion or decision not upon the language of the orders, but upon what it found to be findings of fact sufficient for the purpose embodied in the Commission's reports.

And in enumerating what findings were necessary in order to establish a *prima facie* case for Meeker, it was pointed out that one of the essential findings was, "whether and in what way unjust discrimination was practiced against the shipper." Manifestly this Court did not consider that what was contained in the orders met this requirement, notwithstanding the fact that these orders set forth that the Commission had found that the plaintiff had been charged discriminatory rates. Something more, in the opinion of this Court, was necessary to the establishment of Meeker's case, and that was some finding of the Commission as to the way or manner in which the unjust discrimination had been practiced.

In the present case we have nothing in the reports

or orders of the Commission which indicate the way or manner in which the unjust discrimination complained of had been brought about. We have nothing but the conclusion of the Commission that the defendants in error had not received their fair share of cars. In other words, that they had been discriminated against in the distribution of the cars. But in the Meeker case this Court held that a mere finding that discrimination had been practiced was not sufficient, but that there must go with this, findings which would indicate in what way this unjust discrimination had been brought about.

In view of what was said by this Court in the Meeker case, it would seem to be clear that if in that case all that had appeared in or could be deduced from the Commission's reports was the statement or conclusion of the Commission that the shipper in that case had been charged discriminatory rates, the reports of the Commission would not have made out a *prima facie* case, because of the lack of findings of the facts necessary to show why the rate condemned had subjected the shipper to unjust discrimination.

In the present case, therefore, the conclusion would seem to be fully justified by the decision in the Meeker case, that as the Commission had not found how and in what manner the distribution actually made by the plaintiff in error subjected the defendants in error to unjust discrimination, its reports and orders were not sufficient to make out a *prima facie* case for the latter.

EVEN IF THE REPORTS OF THE COMMISSION ESTABLISHED A *prima facie* CASE, EVIDENCE ADDUCED BY PLAINTIFF IN ERROR ESTABLISHED THAT THE DEFENDANTS IN ERROR WERE NOT ENTITLED TO THE CARS WHICH THE COMMISSION HELD THEY SHOULD HAVE RECEIVED.

We have already had occasion to refer to the statement contained in one of the Commission's reports which embodied the conclusions of the Commission as to the number of cars which the defendants in error should

have received, but for convenience of reference we will reproduce this statement, which was as follows:—

> "That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the Complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods" (Transcript of Record, page 18).

If the defendants in error had received cars sufficient to have enabled them to ship the additional amounts of coal in the two periods which the Commission found they ought to have been enabled to ship, the aggregate of their shipments would have been in the earlier period 74,126.25 tons, and in the later period 37,078.65 tons. In these periods the aggregate rating of the defendants in error's mine, ascertained by multiplying the daily rating of 450 tons which the Commission found to be a fair rating by the number of days which the Commission found the mine would probably have worked, viz., 275 days, was 123,850 tons, and if the defendants in error had shipped in this period 74,126.25 tons, their shipments would have amounted to 59.9 per cent. of their mine's aggregate rating. And as in the later period the aggregate rating of their mine, ascertained in the manner above indicated, was 62,212.50 tons, the defendants in error would have shipped 59.6 per cent. of this rating if they had shipped the tonnage which the Commission held they should have received cars for, viz., 37,078.65 tons (Transcript of Record, page 110).

The Commission, as we have already pointed out, did not indicate how it had reached the conclusion that in the earlier period the capacity of the cars which the defendants in error should have received should have been equal to 59.9 per cent. and in the later period to 59.6 per

cent. of their mine's rating, but the manner in which these percentages were arrived at was clearly established upon the trial of the case. There were put in evidence upon the trial two exhibits which had been put in evidence by the defendants in error in the proceeding before the Commission, and upon which they relied to establish their claim of discrimination. These two exhibits will be found at pages 104 and 105 of the Transcript of Record.

The plaintiff in error had for car distribution purposes and for other operating reasons divided all of the coal territory tributary to its line into certain districts or regions. The mine of the defendants in error was located in what was known as the "Tyrone Region," and it appears from the exhibits above referred to that certain operators in this and an adjoining region, known as the "Snow Shoe Region," had received in the two periods into which the Commission divided the period covered by the claim of the defendants in error, cars equal in capacity to 59.9 per cent. and 59.6 per cent. respectively of the aggregate capacity of their mines. The percentages which these mines received, therefore, accorded exactly with the percentages which the Commission found the defendants in error should have received.

It was further established upon the trial through the testimony of one of the defendants in error, William F. Jacoby (Transcript of Record, page 106), that he and his partner had made up the figures embraced in these exhibits, and in doing so had included all classes of cars, as well those which were subject to allotment, in the distribution of which the defendants in error were entitled to share, as those which were not so subject, the latter embracing the private or individual cars of shippers, the fuel cars of other railroad companies and the fuel cars of the plaintiff in error.

In addition, it appeared that the mines embraced in these exhibits were only a small proportion of those located in the Tyrone and Snow Shoe Regions. They

comprised 20 or less out of a total of about 150, and their shipments amounted in the earlier period to about 40 per cent. of the total region shipments, and in the later period to about 32 per cent.

It is indisputable, therefore, that the Commission's finding—if such it can be called—as to the additional tonnage which the defendants in error should have been enabled to ship, was rested upon the theory or conclusion that in the two periods into which the Commission divided the period of the action the defendants in error should have received in the earlier period cars equal in capacity to 59.9 per cent. of the aggregate ratings of their mine, and in the later period to 59.6 per cent. of the aggregate ratings.

It is equally indisputable that in reaching this conclusion the Commission proceeded upon the theory that the number of cars which the defendants in error should have received was to be determined and measured by the average number which had been received by certain mines which had been picked out or selected by the defendants in error from all of those in the region in which their mine was located for the purpose of instituting or making a comparison between the car deliveries at these other and their mines, respectively, and not by the number which would have been allotted to them had the plaintiff in error made distribution of its available cars in accordance with the rule prescribed by the Commission.

And it is a further indisputable fact that the cars shown by the exhibits as placed at the selected mines embraced all cars placed thereat, whether they were individual or private cars, fuel cars of the plaintiff in error or of other railroad companies, or so called system cars of the plaintiff in error, notwithstanding the fact that under the rulings of the Interstate Commerce Commission only the last named class, that is, the systen cars of the plaintiff in error, were subject to allotment and distribution among shippers, due to the fact that the owners of the private or individual cars were entitled

to their exclusive use, while the fuel cars of the plaintiff in error and of other railroad companies had necessarily to be placed, at the mines from which the fuel supply coal was being shipped.

We submit, therefore, that because of the considerations to which we have just alluded the car deliveries shown by these exhibits to have been made at certain mines afforded no basis whatever for the ascertainment of the number of cars which the defendants in error should have received. Their rights were to be measured not by the number which some one or more other mines may have received, but by their proper share of the cars available for distribution, and not being the owners of any individual cars themselves, and not being entitled to any fuel cars, their rights were not to be ascertained or measured with reference to the deliveries of cars made at mines which were entitled to and had received individual and fuel cars.

In making up these exhibits the defendants in error had not shown separately the various classes of cars embraced in the totals shown therein, and consequently it was impossible to tell from the exhibits themselves to what extent the distribution made at any one or more of these mines had been affected by the private or fuel cars which these mines had received. Messrs. Jacoby and Weber, however, who made up these exhibits, had made up another statement which had been submitted to the Interstate Commerce Commission, which did disclose the character of the cars which had been delivered to the mines of the Berwind White Coal Mining Company, which were among those embraced in the exhibits in question, and as to the character of the cars placed at these mines Mr. Jacoby testified as follows:—

> "By MR. GOWEN:
>
> "Q. Take the Berwind White Coal Mining Company. For the first period how many cars do you show as having been deliverd at the mine of that company?
>
> "A. 13,452 cars.

"Q. Referring to another statement which I understand you also prepared and which I hand you, will you state how many of the 13,452 cars were system cars of the Pennsylvania Railroad?

"A. 460.

"Q. All the other cars which were delivered to the Berwind White Coal Mining Company were either the private or individual cars of the company or were fuel cars of the defendant?

"A. Yes, sir.

"Q. Now, coming to the second period, how many cars do you show in that exhibit as having been placed at the mines of the Berwind White Coal Mining Company?

"A. 7,154.

"Q. Referring, then, to the statement which you have just referred to, will you please say how many of those cars were system cars of the Pennsylvania Railroad?

"A. 60.

"Q. All the balance of the 7,154 cars were then either the private or individual cars of the Berwind White Coal Mining Company, or their fuel cars?

"A. Yes, sir" (Transcript of Record, page 107).

While in the exhibit which was adopted by the Commission the Berwind White Coal Mining Company is shown to have received in the earlier period cars equal in capacity to 55.5 per cent. of its mines' ratings, and in the later period cars equal in capacity to 62.3 per cent. of its mines' ratings, the testimony of Mr. Jacoby established that the allottable or distributable cars received by that Company in the earlier period did not amount to 2 per cent., and in the later period to 1 per cent. of the mines' ratings.

As we have already said, there was nothing in the evidence to indicate how many allottable cars the other mines embraced in these exhibits, other than those of the Berwind White Company had received, but in view

of the admission by the defendants in error that in making up these exhibits they had included all classes of cars, both those which were subject to allotment among shippers generally and those which were not, the distribution which is shown by these exhibits to have been made at the various mines embraced therein afforded no basis whatever for measuring the allotment which should have been made to the mine of the defendants in error.

But not only were these exhibits, because of the inclusion of unallotable cars, worthless for the purpose of measuring or ascertaining the number of cars which should have been delivered to the defendants in error, but they were also worthless for the other reason to which we have already adverted.

The measure of the plaintiff in error's duty and of the defendants in error's right was thus properly defined by the learned trial Judge:—

> "It was the duty of the defendant to apportion and deliver to the plaintiff their fair share of all the cars available during the period of the action for shippers in the district in which the plaintiffs' mine was located. If the plaintiffs received their fair and proper share of the cars so distributed in the district they have no cause for complaint against the defendant upon the ground of discrimination. The burden is upon the plaintiff to establish by satisfactory proof that they did not receive their share."

This instruction was embodied in the fifteenth point of the plaintiff in error which was affirmed by the trial Judge (Transcript of Record, page 130).

Assuming the correctness of this instruction—and its correctness, we think, cannot be successfully questioned—there must have been evidence to justify a finding by the jury that the defendants in error had not received their fair share of the cars available for shippers in the district in which their mine was located. No such evi-

dence was adduced by the defendants in error. All that was submitted to the jury was a finding of the Commission which when considered in connection with the established fact amounted to this:

We find that certain of the mines in the region in which the complainants' mine is located received in the earlier period cars equal to 59.9 per cent. of their ratings, and in the later period to 59.6 per cent. of their ratings. We therefore conclude that the complainants ought to have received the same percentages.

If the conclusion of the Commission had been thus expressed, the learned trial Judge could not have allowed the jury to base their verdict upon it because it would have been in direct conflict with the standard or measure which he had laid down to them as defining the extent of the defendants in error's rights. If, then, it be true that the trial Judge would have been obliged to instruct the jury that the Commission's conclusion or finding must be ignored if it had been so worded as to indicate on its face how it had been reached, must not the same result follow when it had been demonstrated that the objectionable standard or measure actually formed the basis for the Commission's finding?

We submit, therefore, that the plaintiff in error was entitled to an affirmance of the following point or request for charge submitted by it:—

> "4. The award of the Interstate Commerce Commission is based upon the conclusion that the plaintiffs in the year ending April 1st, 1905, should have received cars equal in capacity of 59.9 per cent. of the aggregate of their daily mine rating for 275 days, and in the period between April 1st, and October 18th, 1905, cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine rating for 138¼ days. It is apparent that this conclusion of the Commission was based upon the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines

selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have been placed at the plaintiff's mine, the basis for the Commission's award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

The learned trial Judge, however, refused to affirm the point, and he also refused two other points to the following effect:—

"8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1st, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings, and in the period between April 1st, and October 18th, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9 per cent., and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

"9. If the jury find that if the defendant had made distribution of its cars in accordance with the method prescribed as proper by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1st,

1905, cars equal in capacity to 59.9 per cent. of the rating of their mine, and in the period between April 1st, 1905, and October 18th, 1905, cars equal in capacity to 59.6 per cent. of the rating of their mine, and that the award of the Commission was based upon the theory or conclusion that cars equal in capacity to these percentages, respectively, should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover."

The plaintiff in error was entitled, we submit, to an affirmance of all of these points.

The learned counsel for the defendants in error in the brief presented to one of the Courts below, attempted to sustain the right of the Commission to adopt as the measure of the defendants in error's rights the percentages of 59.9 per cent. and 59.6 per cent. of their mine's capacity, upon the following grounds:—

"However, if the Commission had fixed the plaintiffs' damages at the difference between their actual car supply and a car supply on a basis of 59.9 per cent. of their mine's rated capacity for the first period covered by their complaint, and of 59.6 per cent. for the second period, such standard would have been a proper standard by which to estimate plaintiffs' damages.

"The evidence before the Court in this case (pages 64, 65), shows that, during the periods covered by this suit, certain named mines in the Tyrone Division, operating under similar circumstances and conditions with plaintiff's mine, were being furnished cars to ship 59.9 per cent. of their rated output in the first period, and 59.6 per cent. of their rated output in the second period; and the effect of the above suggested standard being adopted by the Commission would merely be to place Falcon No. 2 mine on an equality with these favored mines in the Division.

> "Section 3 of the Act to Regulate Commerce provides that: 'It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect, whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'
>
> "The Act was intended to produce equality among shippers and this can only be secured by giving to every shipper the same advantages given to the most favored shipper or its equivalent in damages."

Manifestly this position is an unsound one. If the mines receiving the percentages of cars referred to in this extract from counsel's brief were unduly favored, it does not follow that the defendants in error were legally injured because they did not receive a like preference. They were injured, if at all, only to the extent to which the overdelivery to these other mines resulted in a reduction of the number of cars which the defendants in error otherwise would have received. This is clearly the law, and was recognized as such by the learned trial Judge.

> "The law provides," said Judge Thompson in his charge to the jury, "that a shipper shall recover the full amount of damages which he sustains, and in arriving at the amount of damages which these plaintiffs sustained you can only take into consideration whether they have been discriminated against and to what extent they were damaged by that discrimination. If one company got half of the cars which were distributable for that system when it was only entitled to one-quarter, then the amount that the other mine owners would be damaged would be the amount to which their share would be diminished

> by giving that larger allotment to somebody else. In other words, if the Berwind White Company got 59 per cent. of its output when the average allottable was 28 per cent., it does not necessarily follow that the complainants would have been damaged the entire difference between 28 per cent. and 59 per cent. They would be damaged the amount to which their number of cars would be reduced in the general allotment by favoring somebody else and taking the cars from them." (Transcript of Record 129).

Under this view of the law—and we submit it is unquestionably the correct one—it is not possible to sustain the Commission's finding or conclusion that the defendants in error should have received cars equal to 59.9 per cent. and 59.6 per cent. of their mine's capacity.

This would have been true even if the only evidence in the case tending to establish what the car distribution made by the plaintiff in error had been in the period of the action had been the exhibits which we have been considering.

But upon the trial the plaintiff in error put in evidence exhibits which will be found at pages 122 and 123 of the Transcript of Record, which show the total rating in cars of all mines embraced in the region in which the defendants in error's mine was located and the total number of cars placed in this region in the two periods into which the Commission divided the period of the action, and following these exhibits on page 123 of the Transcript of Record will be found the testimony of Edmund C. Haley, as to the percentage of cars placed in this region in these two periods. The percentage in the earlier period was 30.3 per cent., and in the later period 29.9 per cent. The cars embraced in these exhibits included cars of all classes, as well those which were not subject to allotment—the individual and fuel cars—as those which were subject to allotment among shippers generally.

It was admitted that the defendants in error had no private or individual cars, and were not entitled to receive any fuel cars, as they were not shipping any railroad supply coal, and it is consequently apparent that if they had received cars equal in the earlier period to 30.3 per cent. of their rating, and in the later period to 29.9 per cent. of their rating, they would have received all and more than they could possibly have been entitled to.

As appears from the exhibits already referred to, which will be found at pages 104 and 105 of the Transcript of Record, the defendants in error in the earlier period received cars equal to 28 per cent. of their mine's rating, and in the later period to 23.9 per cent. of their mine's rating. In the earlier period, therefore, their percentage was 2.3 per cent less than the region percentage, and in the later period 6 per cent. less.

In view of the fact that the region distribution included large numbers of cars in the allotment and distribution of which the defendants in error were not entitled to participate, it is impossible to affirm that the lower percentages of the defendants in error indicated that they had not received their proper share of the cars distributed in the region. As a matter of fact, it is a necessary conclusion from the testimony that the defendants in error were not entitled to the region percentage, due to the fact that more than one-half of the cars distributed in the region were made up of individual or private cars and fuel cars. This appears from the exhibit which will be found at page 121 of the Transcript of Record.

But even if we were to treat the region percentages as controlling and as measuring the defendants in error's rights, the recovery which they have secured in the present action would not be thereby justified because this, as we have shown, has been based upon the theory that instead of receiving in the earlier period the region percentage of 30.3 per cent., they ought to have received 59.9 per cent., and instead of receiving in the later

period the region percentage of 29.9 per cent., they should have received 59.6 per cent. of their mine ratings.

In view of the Region distribution, the conclusion is irresistible that the larger percentages received by the selected mines embraced in the exhibits prepared by the defendants in error were due either to the large number of individual and fuel cars delivered to them or to an unduly preferential allotment to them.

It is immaterial, so far as the present case is concerned, to which of these causes the larger percentages were due, for if the individual and fuel cars were responsible therefor, these percentages afforded no measure for the ascertainment of the percentage which should have been received by the defendants in error, who had no individual or fuel cars, and if preferential allotment was the explanation of these larger percentages, then clearly the defendants in error could not properly claim that they were damaged because they were not also preferred.

In Pennsylvania Railroad Company *vs.* Puritan Coal Mining Company, decided by this Court April 5th, 1915, the shipper sought to have the cars to which it was entitled ascertained with reference to the number received by another shipper who, it was claimed, had been unduly preferred. This claim was thus overruled by the trial Judge:—

> "The contention of the plaintiff is that it was entitled to as large a percentage of cars as any other shipper situated substantially the same as the plaintiff and under substantially the same conditions.
>
> "Ruling: This exception is overruled. It refers to and covers one of the principal contentions in the case as to the measure of damages. The contention of the plaintiff that it is entitled to as large a percentage of cars as any other shipper situated substantially the same as the plaintiff and under substantially the same conditions leads to such an excess of damages that we believe that that fact alone proves the falsity of the theory. The law gives the injured

> party the right to recover damages measured by what will compensate him for his injury. All, therefore, it seems to us that the plaintiff is entitled to is that which will compensate him for what he did not get of that to which he was entitled. Giving cars proportionate to what the favored shipper got would be to make him also a preferred and favored shipper in damages although not in cars. This surely is not contemplated by the legislation governing discriminatory acts."

In Hillsdale Coal and Coke Company *vs.* Pennsylvania Railroad Company, 19 I. C. C. 356, the Interstate Commerce Commission recognized that the number of cars received by an alleged favored shipper did not fix the *pro rata* or share which other shippers should have received. In its report in that case the Commission said:—

> "The Act to regulate Commerce as amended not only gives a shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier, but gives him the assurance also that no else shall fare ratably better than he does at the hands of the carrier. It may be true that a Court would not allow the Complainant damages for losses due to the defendant's failure to furnish the cars that it was not entitled to receive, but this Commission may surely require an interstate carrier to cease and desist from giving its competitor more cars than the competitor is entitled to receive."

In the present instance, however, the Commission has clearly made an award to the defendants in error because of the plaintiff in error's failure to furnish cars that the defendants in error were not entitled to receive, and in so doing has, we submit, been guilty of a clear mistake in law.

The theory upon which the Commission has acted in the present case is also at variance with the de-

cision of this Court in the case of Pennsylvania Railroad Company *vs.* International Coal Mining Company, 230 U. S. 184. In that case this Court in effect determined that the damages of a shipper who had been charged discriminatory rates were not to be measured by the amount of the preference extended to another shipper, but by the amount of the damage which the complaining shipper had sustained as the result of the preferential rates accorded to his competitor.

NUMBER OF CARS TO WHICH THE DEFENDANTS IN ERROR WERE ENTITLED SHOULD HAVE BEEN ASCERTAINED WITH REFERENCE TO THE RULE OF DISTRIBUTION IN FORCE DURING THE PERIOD OF THE ACTION, AND NOT WITH REFERENCE TO A RULE SUBSEQUENTLT PROMULGATED BY THE INTERSTATE COMMERCE COMMISSION.

In another respect the method adopted by the Commission for ascertaining the number of cars which the defendants in error should have received was legally objectionable.

The number was ascertained not with reference to and in accordance with the rule of distribution in force during the period of the action, but ostensibly, at least, with reference to and in accordance with another and different rule promulgated by the Commission some years after the close of the period of the action, although, as we trust we have demonstrated, even this rule was not properly used or applied by the Commission.

The objection that the Commission could not lawfully give a retroactive effect to its rule was not made or urged in the Court below. But that it could not do so would seem to be the necessary result of the decision of this Court in the case of the Pennsylvania Railroad Company *vs.* Puritan Coal Mining Company, decided April 5th, 1915.

In that case it was held by this Court that the present plaintiff in error was responsible to shippers for non-compliance with the method or system of distribution

prescribed by its rule in force during the period of that action, and that, as the rule in question did not contemplate that individual cars should be counted, the shipper in that case was entitled to have the number of cars which it should have received determined without reference to the number of individual cars which had been delivered to it.

In the proceeding which eventuated in the award for the recovery of which the present action was brought, the Interstate Commerce Commission has held that any rule which did not require that private cars should be counted was unlawful because violative of Section 3 of the Interstate Commerce Act, and that in determining the number of cars which a shipper ought to have received, the private cars received by shippers must be counted.

The order of the Commission embodying this finding or determination will be found at pages 36 and 37 of the Transcript of Record.

The fact was not unknown to this Court when it rendered its judgment in the Puritan case that the Commission had condemned the rule which the shipper in that case was permitted to secure the benefit of, for in the opinion of the Court reference is made to the variance between the carrier's and the Commission's rules, and it was stated in the opinion that it was not necessary to determine in that case whether the Commission's rule could be given a retrospective effect.

There was no doubt that the Commission had itself given to its rule a retrospective effect, and if in so doing the Commission was acting within the limits of its powers, the conclusion would seem to be inevitable that the shipper in that case, the Puritan Company, was as much subject to the Commission's rule as was the plaintiff in error. Indeed, the main and avowed purpose of the rule announced by the Commission was to prevent shippers who were owners of private cars from securing the advantage of an allotment of the carrier's cars which took no account of their own cars which had been delivered to them. If, therefore, the Commission's rule could properly

be regarded as affecting the Puritan Company and other shippers in the period antedating its promulgation, this Court, it is submitted, would not have permitted that Company to secure damages for the non-delivery of cars, the receipt of which would have secured to the Puritan Company an unlawful preference.

This Court has determined that a carrier's rule of car distribution is binding upon shippers and Courts until a different rule has been established by the Interstate Commerce Commission in the exercise of its administrative powers.

Would it not be entirely compatible with the purpose of the Interstate Commerce Act to treat the carrier's rule as controlling and determining the rights of shippers so long as it remains in effect or at least until its validity or propriety is challenged by a proceeding before the Interstate Commerce Commission?

If we are to adopt the view taken by the Supreme Court of Pennsylvania in the Puritan Coal Mining Company case, 237 Penna. State Repts., 420, a rule of distribution promulgated by the Commission is only effective and controlling from the date of the Commission's order. That Court in disposing of the contention that the State Court had not jurisdiction of the action pending before it, held, in effect, that orders of the Interstate Commerce Commission regulating car distribution could have no retroactive effect.

Speaking of the effect of the establishment by the carrier of a rule of distribution, the Supreme Court of Pennsylvania in that case said:—

> "Had the plaintiff been dissatisfied with the regulation it could have appealed to the Commission to correct it; had its appeal been sustained and followed by an order of amendment or correction of the regulation, then, *upon subsequent disregard of the regulation as amended, plaintiff's only forum for relief would have been the Federal Court since in that case again Congress would have taken possession of the field.*"

The Court admitted in that case that from the date when Federal control was effectively exercised by the action of the Interstate Commerce Commission, State control ceased, but in the Court's opinion the Commission's action was only effective on and after the date of its orders.

We are not concerned here with the power, generally speaking, of the Interstate Commerce Commission, to give a retroactive effect to any conclusion or decision which it may reach, but the question is whether justice to a carrier does not require that the Commission shall refrain from giving such effect to an order regulating or modifying a carrier's system of car distribution, especially when the carrier's rule is not transgressive of the requirements or obligations of the Interstate Commerce Act as theretofore interpreted and defined by the Commission, and is not at variance with the practice of other carriers.

Where the Commission finds that a carrier has been charging an unreasonable or a discriminatory rate, no injustice is done to the carrier by requiring it to refund the amounts which it has received which the Commission finds it was not properly entitled to demand or collect. But the case is different when a carrier's system of distribution is condemned or found to be unlawful and improper by the Commission. The carrier has derived no benefit from the enforcement of the rule which it has established, and indeed, generally speaking, had but little, if any, interest in the character of the rule which should control it in the distribution of its equipment. When it promulgates its rules, therefore, and lives up to these and its shippers acquiesce therein, or at least take no proceedings to have the validity of these rules tested by the only tribunal which is competent to pass upon the subject, is it unreasonable to hold these shippers bound by their acquiescence in the rules thus established? One need not go outside of the present case in order to see what a hardship is imposed upon the carrier by a construction of the Interstate Commerce Act which would

permit the Commission at the instance of shippers to declare unlawful rules of car distribution which with their acquiescence have controlled the carrier for years preceding the Commission's action.

In the present case the defendants in error instituted no proceedings before the Commission questioning or challenging the rule of distribution which had been established by the plaintiff in error until June, 1907.

The Commission made no order in this proceeding condemning the rule of the plaintiff in error until March, 1910, and it then proceeded to make its condemnation of the plaintiff in error's rule operative as far back as the year 1904.

If every shipper had taken advantage of the opportunity afforded by this action of the Commission, the plaintiff in error would have been called upon to pay damages running into many hundreds of thousands of dollars, and this because, in the judgment of the Commission, the rule established by the plaintiff in error was not as well calculated to secure equality of treatment among shippers as that devised by the Commission. And yet the rule condemned by the Commission was designated by this Court in the Puritan case as a reasonable rule, and even if it was not calculated to produce the fairest allotment and distribution of a carrier's equipment, it would be unfair that the carrier should be penalized for its mistake in this respect, in view of what both the Commission and this Court have said in respect to the uncertainty existing among the carriers of the country as to the rule of distribution which would best accomplish the purposes sought to be secured by the Interstate Commerce Act.

In the Morrisdale Coal Company case, 230 U. S. 304, Mr. Justice Lamar, delivering the opinion of this Court, speaking of this uncertainty, said:—

> "But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which

this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. As late as 1910, it was said (19 I. C. C. 387), that the question was in a state of flux, and an examination of the decisions in the numerous cases brought about that time will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads, consigned to particular mines, should be counted in making the distribution. Others held that such cars should be counted, but that if the foreign cars, or those owned by the private corporations, exceeded their percentages, the excess might be retained by those coal companies. This view was adopted by the Commission, which also held that fuel cars belonging to the carrier should be counted except where the railroad purchased the entire output of the mine."

If the present judgment should be permitted to stand, this anomalous situation would be presented: That one shipper, the Puritan Coal Co., by electing to hold the carrier to its rule of distribution, has got the benefit of a system of distribution favorable to itself, while another shipper has, by challenging the rule and securing its condemnation by the Interstate Commerce Commission, got the benefit of another and irreconcilable system of distribution favorable to it.

Clearly it would seem that this result is inadmissible, whether considered from the standpoint of the carrier or the shipper, for if there is one thing that is essential in order that the obligations of the Interstate Commerce Act may be complied with, it is that there should be but one uniform system of distribution by a carrier of its equipment among all its shippers.

The decision of this Court in the case of the Pennsylvania Railroad Company *vs.* Clark Brothers Coal Mining Company (decided June 21st, 1915,) is not op-

posed to the view of the Commission's power to which we have just been referring. All that this Court decided in that case was that, when a shipper invoked the jurisdiction of the Commission in order to secure a finding as to the legality of a carrier's rule of car distribution, it thereby established the character of its claim for damages resulting from the enforcement of an unjust rule so far as its interstate transactions were concerned, and, consequently, such a claim could be prosecuted solely under and in accordance with the provisions of the Interstate Commerce Act. It was not necessary for this Court in that case to determine what was the extent of the relief which the Commission was empowered to grant, and no opinion was expressed by the Court on this point.

Reports and Orders of the Commission as a Whole Wrongly Admitted in Evidence.

All the reports and orders of the Interstate Commerce Commission were admitted *in solido* over the objections of the plaintiff in error.

The objection to the admission of the reports and orders will be found at page 59 of the Transcript of Record, and was in the following form:—

> "Mr. Gowen:
>
> "We object to the admission of the report and the order in evidence because it is but a part of the Record in the case and is not, therefore, admissible as the Record before the Commission; and also because it embodies conclusions of law, arguments and other matters extraneous from and entirely disassociated from findings of fact, and by the Interstate Commerce Act findings of fact of the Commission are alone made *prima facie* evidence."

The objection to the admission of the supplemental report of the Commission will be found at page 67 of

the Transcript of Record, and the objection to the admission in evidence of the order of the Commission at page 69 of the Transcript of Record.

All these objections were overruled and the reports and orders as a whole were admitted.

A perusal of the reports thus put in evidence will show how hurtful their admission must have been to the plaintiff in error. Thus, at page 64 of the Transcript of Record will be found the Commission's comments which were read to the jury upon certain special orders in force during the years 1902, 1903 and 1904, providing for the special allotment of 500 cars daily to the Berwind White Coal Mining Company. With reference to these orders the Commission say:—

> "That Company had contracts for supplying coal for certain steamships sailing from New York Harbor. Complaint had been made that these steamers were frequently delayed because of lack of coal, and the defendant felt that it was warranted in making that special arrangement with the coal mines that had undertaken to supply them with fuel. This preference was the occasion of comment by the Commission in its report in the Coal and Oil Investigation. *Few, if any, of these specially assigned cars reached the Berwind White mines in this particular district, and therefore it is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing company's operations in another district; nevertheless, it was inequitable in principle and undoubtedly so to some extent, at least, in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference to one company and district, and an undue discrimination against coal operations in another district.*"

This special allotment of cars, as the report of the Commission indicates, affected the defendants in error, if

it affected them at all, only because it resulted in diminishing the number of cars available for distribution in the district in which the defendants in error's mine was located, but the Commission, when it came to determine the damages, did not find that the defendants in error had sustained any damage whatever due to the consideration that the cars distributed in the district in which their mine was located were less than ought to have been available for distribution.

And when it is considered that in the entire period of the action the deliveries of cars to the Berwind White Coal Mining Company included but 520 of the plaintiff in error's cars, other than its fuel cars, the irrelevancy of the reference to the so-called 500-car order is only the more strongly accentuated.

Again, the Commission in its report said:—

> "Another point also mentioned in our report in the Coal and Oil Investigation just referred to is that 1000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind White Company. The defendant to that extent diminished its capacity to supply the coal car requirements of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors" (Transcript of Record, page 64).

Here again was an adverse comment by the Commission upon a transaction of the plaintiff in error, the validity of which the Commission said it would not consider, but which nevertheless it commented adversely upon.

Still again the Commission says:—

> "It is established with reasonable clearness on the Record that the Berwind White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars in large numbers, and were therefore kept in operation almost continuously, while the Complainants received an inadequate supply, and were not able, therefore, to run their mines to the best advantage. This difference is largely explained by the fact that the Berwind White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connections with coal."

Unquestionably this statement was an adverse comment by the Commission upon the relative supply of cars to the Berwind White mines and those of the defendants in error. It is true that the Commission somewhat minimized the effect of what it said by the reference to the large number of private cars and fuel cars which the Berwind White Company received, but in view of the fact that throughout the entire period covered by the defendants in error's claim the plaintiff in error had delivered but 520 cars in the allotment of which the defendants in error had any interest, the comments of the Commission upon the relative supply available to the two operations were wholly unjust.

A defendant who is required to overcome a *prima facia* case established by findings of fact of the Commission has a difficult enough burden to discharge. And this should not be added to by thrusting into the jury box comments or animadversions of the Commission upon the conduct or transactions of the defendant and especially is this true where as in the present case what was thus made the subject of comment or animadversion was not even treated or regarded by

the Commission as a contributing cause of the injuries for which the award was made.

AWARD INVALID BECAUSE OF FAILURE OF COMMISSION TO FIND THAT THE AMOUNT THEREOF WAS PROPERLY PAYABLE TO DEFENDANTS IN ERROR.

The power of the Interstate Commerce Commission to award damages is conferred by Section 16 of the Interstate Commerce Act, and that power is thus defined:—

> "That if, after hearing on complaint made as provided in Section 13 of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant *the sum to which he is entitled* on or before a day named."

The power, then, is to award the sum which the Commission finds the complainant is entitled to, and it would seem necessarily to follow that the Commission is without power to award any sum which it has not found that the complainant is entitled to.

As to the obligation devolved upon the Commission to find that a sum is due before an award thereof can be made in favor of a complainant, the Commission itself has said in a proceeding in which the question involved was whether the voluntary or enforced reduction of a rate by a carrier justified an award of damages in favor of a shipper who had paid the higher rate to the reduction:—

> "The reference to particular circumstances and conditions in the classes of cases just mentioned is not an intimation that awards of reparation are to be confined to such cases. It is intended only to make clearer our view that whatever may be the nature of the facts, circumstances and conditions

> appearing in a particular case where reparation is involved, whether on account of excessive rates or by reason of unjust discrimination, *there must be that degree of certainty and satisfactory conviction in the mind and judgment of the Commission as would be deemed necessary under the well established principles of law as a basis for a judgment in Court.*"
>
> Anadarko Cotton Oil Company *vs.* Atchison, Topeka & Santa Fe Railway Company, 20 I. C. C. Rep. 43, 51.

The report of the Commission in the present case contains this statement:—

> "We further find that the complainants in the sale of their mine realized a profit of $7500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded" (Transcript of Record, page 19).

It is undeniable, therefore, that the Commission in the proceeding before it made an award in favor of the defendants in error, and at the same time distinctly declined to determine whether the defendants in error were entitled to the amount thereof or only to such amount less some deduction. We submit that the award, therefore, lacked the basis which was essential in order to make it valid, viz., that the Commission should have determined that the defendants in error were entitled to the amount thereof.

In this connection it is quite immaterial, it would seem, whether the sum of $7500 referred to by the Commission or any part of the purchase price of their mine should or should not have been taken into account in determining the amount of the reparation to which the defendants in error were entitled. It was a prerequisite

to any valid award of the Commission that it should determine whether the amount thereof was properly payable by the plaintiff in error, and this determination, as we have shown, was lacking in the present case.

There was a very substantial basis for the contention that some of the purchase price should be taken into consideration in determining the damages sustained by the defendants in error. In determining these damages the Commission ascertained the amount of coal which would have been shipped in the additional cars had these been available, and the profit that the defendants in error would have realized thereon, and the damages were determined with reference to this profit. Of course the coal which had not been shipped was not lost to the defendants in error, but remained in the ground available for future disposition, and it was actually afterwards disposed of when the defendants in error sold this unmined coal in conjunction with their mine.

The Commission's conclusion was that the defendants in error ought to have been enabled to ship 54,516 tons in addition to the tons which were actually shipped in the period covered by the claim. The fact that this amount of coal still remained unmined and available to the purchaser undoubtedly materially enhanced the price which the defendants in error were able to secure for their mine and coal estate when it subsequently disposed of the same.

"The record shows," says the Commission, "a purchase price of $25,000 and that W. F. Jacoby & Co. retained the mine until October, 1905, when they sold it for $32,500, or for $7500 more than they paid for it. In the meantime they had mined 55,000 tons of coal and sold it apparently at a profit of about 20 cents a ton. Whether the mine could have been sold so well if more coal had been taken out of it by the complainant is a question as to which it is difficult to arrive at a satisfactory conclusion." And there the Commission left it.

Unquestionably the value of the mine at the time of its sale by Jacoby & Co. was largely governed by the coal

then available for mining, and consequently the defendant in error realized something through the enhanced value of the mine, for the 54,000 tons which were not mined due to the lack of cars in the period of the action.

The Commission was required, we submit, to determine what was thus afterwards realized for the 54,000 tons and to correspondingly reduce the damages. But in any event it was required to pass upon and determine the question whether the profit subsequently realized from the sale of the 54,000 tons should or should not be taken cognizance of.

F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON.
For Plaintiff in Error.

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OCT 14 1915
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No. ~~1397~~ 22 October ~~Term, 1915.~~

IN THE

SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, co-partners, trading under the firm name of W. F. JACOBY & COMPANY,
Defendants-in-Error.

On Certificate from and Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Brief for Defendants-in-Error.

WM. A. GLASGOW, JR.,
Counsel for Defendants-in-Error.

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INDEX.

Page

Statement of Case 1

Argument:

I. Violation by Defendant of Section 3 of the Act to Regulate Commerce 11

II. The effect to follow from the Finding of the Commission that the Defendant had Violated Section 3 of the Act to Regulate Commerce 19

III. Plaintiffs proceeded, as was necessary, by Complaint to the Commission that they were injured by Defendant's Violation of the Act, and prayed for an Award in the Amount of the "Damages sustained in consequence of * * * * such violation of the Provisions of" the Act 20

IV. Procedure by Plaintiffs before the Commission was in the Appropriate and Necessary Forum, and was authorized by Section 9, and followed the Provisions of Section 13 26

V. Duty of the Commission after Investigation of Plaintiffs' Complaint 28

VI. The Defendant having Violated the Provisions of the Act, the Commission found that the Plaintiffs were "injured thereby" and Suffered Loss amounting to $21,094.39, with Interest from June 28th, 1907, which amounted to the Sum covered by the Judgment of the District Court 34

VII. The Act, Section 16, Provides a Statutory Proceeding against a Defendant Carrier, who "Does not comply with an Order for the Payment of Money", and declares the Effect to be given, by the Courts, to "Facts" stated in the "Findings and Order of the Commission" 37

The Brief for Plaintiff-in-error 43

INDEX (Continued).

TABLE OF CASES.

	Page
Abilene Case, 204 U. S. 426	16-21
Act to Regulate Commerce, Secs. 8, 9, 13, 14, 16	19-21-26-28-29-37-38
*Detroit Chemical Works v. Erie R. R. Co., 13 I. C. C. Rep. 363	32
*Detroit Chemical Works v. N. C. Ry. Co., 13 I. C. C. Rep. 357	32
Hillsdale Coal & Coke Co. v. Penna. R. R. Co., 229 Pa. 61	49
*I. C. C. v. Illinois Central, 215 U. S. 452	13
*Ills. Central R. R. v. Mulberry Hill Coal Co., decided June 14th, 1915	24
Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412	29-41-43-48
Meeker v. Lehigh Valley R. R. Co., 236 U. S. 434	33-42
Mills v. Lehigh Valley R. R. Co., 238 U. S. 473	31-35-42-43-48
Mitchell Coal Co. v. Penna. R. R. Co., 230 U. S. 247	14-21-22-40
Morrisdale Coal Co. v. Penna. R. R. Co., 230 U. S. 304	11-12-15
Morrisdale Coal Co. v. Penna. R. R. Co., 183 Fed. 929	22
*Naylor & Co. v. L. V. R. R. Co., 15 I. C. C. Rep. 9	31
*Parks v. Cincinnati, &c., Ry., 10 I. C. C. 47	13
Pennsylvania R. R. Co. v. Clark Coal Co., 238 U. S. 456	23-24-34-40
Penna. R. R. Co. v. International Coal Mining Co., 230 U. S. 184	26-46
Pennsylvania R. R. Co. v. Puritan Coal Co., 237 U. S. 121	15-16-20-22-23-24
*Pitcairn Case, 215 U. S. 481	13
Report of Committee on Interstate Commerce, Jan. 18, 1886	39
*Robinson v. Balt. & Ohio, 222 U. S. 506; 36 Stat. 551 (15); 38 Stat. 220	16
*Thompson v. Pennsylvania R. R., 10 I. C. C. 640	13

*Cited in cases referred to by us.

IN THE

Supreme Court of the United States.

October Term, 1915. No. 139.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, Co-partners, Trading under the firm name of W. F. JACOBY & COMPANY,
Defendants-in-Error.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANTS-IN-ERROR.

The defendants-in-error, W. F. Jacoby and Isaac C. Weber, co-partners, trading in the coal business, under the firm name of W. F. Jacoby & Company (plaintiffs below, hereinafter called plaintiffs), were, from April 1, 1904, to October 18, 1905, engaged in operating a coal mine, known as Falcon No. 2, on a tract

of bituminous coal land, situated in Bigler Township, Clearfield County, Pennsylvania (Commission's Report, Record, p. 31).

The mine was fully equipped for operation, and on April 1, 1904, was provided with an underground electric system for hauling mine cars, had a first class wooden tipple and patent dump, an ample supply of mine cars and track facilities, and the grades favored the outward movement of loaded mine cars, and the mine was regarded as one of the best equipped mines in the District (Commission's Report, Record, p. 31).

The coal in the Falcon No. 2 mine was accepted as a very superior grade of steam coal, and was readily marketable, and was shipped to other States than Pennsylvania, in interstate commerce. In 1904 there were about 100 acres of coal remaining in sight, in the tract, (Commission's Report, Record, p. 32). The rated capacity of the mine, made by the Pennsylvania Railroad Company (defendant below, hereinafter called defendant), during the period from April 1st, 1904, to October 18th, 1905, as the basis of proportional car distribution, was 450 tons a day (Record, p. 18), and the actual average output capacity of the mine was 600 tons a day (Record, pp. 19, 33). During the period from April 1st, 1904, to October 18th, 1905, the Pennsylvania Railroad Company was a common carrier and engaged in the transportation of coal in interstate commerce, and for the purpose of making a pro rata distribution of cars to mines in the coal fields, it divided its coal territory into Coal Districts served by the Divisions of its Railroad (Record, p. 94), in one of which Coal Districts, known as the Clearfield District, served by the Tyrone Division, the Falcon No. 2 mine was situate. On the same Division and in the same Coal District, there were a number of other mines, belonging to

the Berwind-White Coal Mining Company, the Lehigh Valley Coal Company and other mine operators, competing with Jacoby & Company. The mines of the Lehigh Valley Coal Company were on a different branch of the Pennsylvania Railroad, known as the Snowshoe Branch, but were in the same Coal District and on the same Tyrone Division; paid the same rates, and were carried on the same car distribution sheet as Falcon No. 2 (Record, pp. 95, 97, 99, 106). During the period from April 1st, 1904, to October 18th, 1905, the Falcon No. 2 mine, though in operation and demanding cars continually, received far less car service than its rated capacity entitled it to, and also far less car supply than was given by the Pennsylvania Railroad Company during the same period to other mines in the same Coal District and on the same Division above mentioned, of a similar or lower rated capacity and with similar or inferior facilities for mining and loading coal, and was prevented from mining and shipping coal which it was entitled to ship to fill its contracts, and from accepting other available and profitable contracts, and from obtaining and fulfilling other contracts which it could have obtained and fulfilled.

In consequence, the Falcon No. 2 mine was greatly hampered; its employes were forced to leave and seek other employment, and its cost of operation per ton materially increased. Jacoby & Company's business also suffered by reason of inability, due to car shortage, to accept or promptly fulfill contracts at Falcon No. 2 mine, and in October, 1905, they were obliged to go out of business and sell the mine.

In June, 1907, the plaintiffs (defendants-in-error here) filed a complaint with the Interstate Commerce Commission, averring that the Pennsylvania Railroad Company, the defendant (plaintiff-in-error here), had

been guilty of unjust and unlawful discrimination against plaintiffs and in favor of other coal operators in the Clearfield District and on the Tyrone Division, in the distribution of coal cars, during the period from April 1, 1904, to October 18, 1905, and had also been guilty of other unjust and unlawful discriminatory practices against plaintiffs in distributing coal cars among its several Divisions, to the prejudice of the Tyrone Division and to the plaintiffs, as coal operators and shippers on such Division.

The complaint was duly investigated and heard by the Commission, and on March 7, 1910, the Commission filed a report (Record, p. 31), finding that the defendant had been guilty of unjust and unlawful discrimination, in violation of the Act to Regulate Commerce, in both the respects charged.

On page 64, the Commission found:

> "But Falcon No. 2 was not placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal car equipment during the period of this action." (Record, p. 64.)

And in referring to the "special allotment of 500 cars daily" to the Berwind-White Coal Mining Company, which took that number of cars out of the equipment for pro rata distribution to the Tyrone Division, the Commission finds (Record, p. 64):

> "We see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district."

And the Commission further found (Record, p. 65):

> "For the reasons explained at some length in

that case" (Hillsdale Coal & Coke Co. vs. P. R. R. Co.), "those rules" (referring to the rules complained of by Jacoby & Company) "operated as an undue discrimination against these complainants, and we so find. But for the present and for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby."

And on the same day, to wit, March 7, 1910, the Commission issued an order (Record, p. 36), in which the nature of the practices complained of on the Tyrone Division were set forth, and it was

> "*Ordered*, that the said rule, regulation and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated, and is in violation of the third section of the Act to Regulate Commerce." (Record, pp. 37, 66.)

The order then requires the defendant to cease and desist "from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them."

The question of "damages claimed by the complainants" was deferred by the order, "pending further argument in the premises."

Subsequently, on March 11, 1912, the Commission filed a Supplemental Report (Record, p. 14), which

contained the further findings of the Commission as to the complaint of Jacoby & Company (Record, p. 18). In this Supplemental Report the Commission found:

1. "We find that by reason of the discriminations ascertained and set forth in our report in Jacoby vs. P. R. R. Co., 19 I. C. C. 392, the complainants *were damaged to the extent of* $21,094.39, *which they are entitled to recover with interest from June* 28, 1907."

2. "(a) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day."

3. "(b) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days, and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days."

4. "(c) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.92 tons and 19,104.77 tons during the respective periods.

5. "(d) That the average selling price of the complainant's product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine, with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per

ton. This measures *the loss on the tonnage which the complainant was unable to ship.*"

6. "(e) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based *on a fair car supply,* as heretofore stated. This is the *basis* adopted for computing *the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.*" (Italics ours.)

The Commission then finds that the complainants sold their mine and realized a profit of $7,500 over the purchase price which they had paid, but the Commission does not undertake to say that this amount or any part of it should be deducted from the amount of reparation awarded.

On the same day, to wit, March 11, 1912 (Record, p. 26), the Commission entered its order, making its original report and supplemental report a part thereof, in which it "authorized and directed" the defendant, Pennsylvania Railroad Company, "to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, *as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.*

The time within which the Commision ordered the defendant to pay to the plaintiffs the amount which

they were found to have been damaged having expired, the plaintiffs availed themselves of the statutory proceedings provided by Section 16 of the Act to Regulate Commerce, and filed a petition in the District Court of the United States for the Eastern District of Pennsylvania, "setting forth briefly the causes for which he claims damages and the order of the Commission in the premises", and praying the Court to enter a judgment in their favor against the defendant for the amount which plaintiffs had been damaged, as set forth in the reports and orders of the Commission which were filed with the petition as a part thereof.

This was the "petition" which by Section 16 of the Act is spoken of as "a petition *for the enforcement of an order for the payment of money*", and which is required to "be filed in the Circuit Court or State Court within one year from the date of the order, and not after."

A demurrer was filed by the defendant to the petition on September 18, 1912, and on the 12th of November, 1912, the Court handed down an opinion, overruling the demurrer; the defendant pleaded "not guilty", and on the 3d of March, 1913, the cause was tried by a jury. On the trial of the cause the plaintiffs, Jacoby & Company.

I. Offered in evidence the original report of the Interstate Commerce Commission, finding that the defendant had been guilty of unjust discrimination against the plaintiffs, and read to the jury only the pertinent part of said report (Record, pp. 61 to 65, inclusive.) *While objection was made by defendant* to the offer of the report as a whole, which was overruled, no objection was made to the reading to the jury of the pertinent parts of the report. This report was offered for the purpose of showing that *the Commis-*

sion had found that the rules of car distribution which were put into effect and maintained by the defendant during the period covered by the complaint, unjustly discriminated against the plaintiffs, in violation of Section 3 of the Act, and only the pertinent parts were, without objection, read to the jury.

2. Offered in evidence the supplemental report of the Commission as to discrimination, and the fact and amount of damage suffered by the plaintiffs. (See Record, pp. 67-68.)

3. Offered in evidence the order of the Commission requiring the defendant to pay to the plaintiffs the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 20, 1907, "as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports."

The plaintiffs then showed that no part of the award of the Commission had been paid, and that the report and supplemental report of the Commission and its two orders were duly served upon the Pennsylvania Railroad Company.

The defendant then offered evidence, in an effort to show that it had not unjustly discriminated against the plaintiffs, and the plaintiffs offered rebutting evidence, and thereupon, the testimony being closed, the Court charged the jury (Record, p. 124), the charge being in part as follows:

> "The Commission has decided the manner of distribution of coal cars, and that is a question with which you have nothing to do. Their findings on that subject are conclusive, as far as this Court and jury are concerned." (Record, p. 127.)

And further:

> "The Commission's findings of fact you have heard read, and they find among other things that the practices employed in the distribution of coal cars in this particular case were unjust and discriminatory." (Record, p. 125.)

And further, the Court charged the jury that the finding of the fact and amount of damages which the plaintiffs had suffered, by reason of the unlawful discrimination of the defendant, was *prima facie* correct, and "it is entitled to weight with you as being correct on its face, unless the defendant has produced evidence to show that some other state of facts existed, and that the plaintiffs have not suffered the damages which the Commission has awarded to them." (Record, p. 127.)

Thereupon the jury, on the 4th day of March, 1913, found a verdict in favor of the plaintiffs, and assessed their "damages in the sum of $28,572.54." The defendant moved to set aside the verdict and for judgment *non obstante veredicto*, both of which motions were overruled by the Court (Record, p. 142), and on the 19th of May, 1913, the Court entered judgment for plaintiffs and also entered an order under Sections 8 and 16 of the Act to Regulate Commerce, directing that counsel for plaintiffs be allowed a counsel fee of $2,500 for services in the proceeding before the Interstate Commerce Commission, and a further fee of $2,500 for services in the proceeding in the District Court, to which allowances an exception was granted (Record, p. 142). To reverse this judgment, a writ of error was sued out in the Circuit Court of Appeals for the Third Circuit.

The Circuit Court of Appeals at October Term, 1913, certified certain questions, under Section 239 of the Judicial Code, to this Court (Record, p. 157), and

this Court, at October Term, 1914, by writ of certiorari, to the Circuit Court of Appeals, directed that the entire record and proceedings in the case should be certified and sent up to this Court, which was accordingly done.

ARGUMENT.

I. VIOLATION BY DEFENDANT OF SECTION 3 OF THE ACT TO REGULATE COMMERCE.

The proceeding before the Interstate Commerce Commission was brought to have the method of proportional distribution of coal cars by the Pennsylvania Railroad Company, in time of shortage, declared unlawful, and to secure an order of the Commission directing defendant to make reparation to plaintiffs for damages sustained by reason of violation by the defendant of Section 3 of the Act to Regulate Commerce, in that it unjustly discriminated against plaintiffs in the allotment of coal cars.

> "The prohibitions of Section 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference."—*Morrisdale Coal Co. vs. Penna. R. R. Co.*, 230 U. S. 304, at page 312.

Section 3, therefore, fixed the duty which the defendant owed to the plaintiffs and their case was based, and could only be based, upon a violation by the defendant of this duty, under the Act to Regulate Commerce.

There is no defined and fixed method of *fair car distribution* prescribed by the Act to Regulate Commerce, and there is no definition in the Act of what is "unjust discrimination or unfair preference" in such car distribution, and therefore, there must be some tribunal with power and duty in its discretion to determine what

is fair, and whether a certain method of distribution, then in effect, is subject to the charge of "unjust discrimination or unfair preference." This tribunal is the Interstate Commerce Commission, as is clearly shown by the decision of this Court in the Morrisdale Coal Co. case (230 U. S. 304), which case involved the question of fairness of exactly the same method of car distribution, in the same period and in the same Clearfield Coal District, which is now before the Court in this case. In that case, this Court said, by Mr. Justice Lamar, at page 312:

> "But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. As late as 1910, it was said (19 I. C. C. 387), that the question was in a state of flux, and an examination of the decisions in the numerous cases brought about that time will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads, consigned to particular mines, should be counted in making the distribution. Others held that such cars should be counted, but that if the foreign cars, or those owned by the private corporations, exceeded their percentage, the excess might be retained by those coal companies. This view was adopted by the Commission, which also held that fuel cars belonging to the carrier should be counted except where the railroad purchased the entire output of the mine (cases cited).
>
> "It was, however, recognized *that there could be no hard and fast rule*, and that circumstances might arise which would otherwise warrant a departure so as to enable the carrier to meet emergencies arising from a strike on its own road, or embargoes by connecting lines which refused to

haul certain articles of merchandise in order to supply communities with necessaries of life. Parks v. Cincinnati, &c., Ry., 10 I. C. C. 47, Thompson v. Pennsylvania R. R., 10 I. C. C. 640.

"These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force, are sufficient to show that the question as to the *reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission.* It was distinctly so ruled in the Pitcairn case, 215 U. S. 481, and in I. C. C. v. Illinois Central, 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars, and held that the Courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. *If in those direct proceedings the Courts could not pass upon the question of reasonableness of a method of allotting cars, neither can it do so as an incident to an action for damages.*" (Italics ours.)

From the above we deduce the following:

1. Section 3 of the Act prohibits any method of car distribution which is unfair, or which results in unjust discrimination or unfair preference, and requires that the coal cars shall be fairly allotted.

2. There can be no "hard and fast rule" governing car distribution, but the "particular practice and the facts which would warrant a departure from a proper rule actually in force", so far as the reasonableness and fairness thereof is concerned, is within the *power and discretion* of the Commission, and the ruling of the Commission upon the "particular practice" is "administrative in its character."

3. This administrative question, calling for the

exercise of the discretion of the Commission, is one upon which the Courts may not pass judgment.

This last proposition is made certain by the opinion of this Court in recent cases. Thus in *Mitchell Coal Co. vs. Penna. R. R. Co.*, 230 U. S. 247, it is said, by Mr. Justice Lamar, at page 257:

> "But where the suit is based upon unreasonable charges or *unreasonable practices*, there is no law fixing what is unreasonable, and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the Court should pass upon that administrative question. When such order is made, it is as though the law for that *particular practice* had been fixed and the Courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice. *Section 9 gives the plaintiff the option of going before the Commission or the Courts for damages occasioned by a violation of the statute.* But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited." (Italics ours.)

And again the Court, in speaking of orders of the Commission, says (at p. 258):

> "*Such orders, so far as they are administrative, are conclusive*, whether they relate to past or present rates and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order." (Italics ours.)

And again the Court says (pp. 258-9):

> "In considering the administrative questions

as to reasonableness, the elements of the problem are the same, whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and *practices*. In both classes of cases, there is a call for the exercise of the rate-regulating discretion and the same necessity for having the matter settled *by a single tribunal.*" (Italics ours.)

Also, in *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S., 121, this Court said (p. 131):

"But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which *calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission.* It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. *When the Commission has declared the rule to be unjust*, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in Sec. 9. (Italics ours.)

And again (p. 133), this Court said:

"In the distribution of cars to coal companies it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars and the company's own coal cars. In many cases the determination of such an issue would call *for the exercise of the regulating function of the Commission.* That was true in *Morrisdale Coal Co. v. Pennsylvania Railroad*, 230 U. S.

304, 312-314. There the plaintiff admitted that it had received all the cars to which it was entitled under the carrier's rule, but insisted that the rule itself was unreasonable and unjustly discriminatory since it took no account of private and foreign cars controlled by the mining company. *The reasonableness of the rule was a matter for the Commission.*" (Italics ours.)

And again (p. 130), this Court said:

"Construing, therefore, Secs. 8, 9 and 22 in connection with the statute as a whole, it appears that the Act was both declaratory and creative. It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of state courts in any case, new or old, where *the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission;* or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive. Compare *Abilene case*, 204 U. S. 439-446; *Robinson v. Balt. & Ohio*, 222 U. S. 506; 36 Stat. 551 (15); 38 Stat. 220." (Italics ours.)

So we may conclude that a finding of the Commission that the defendant had been guilty of *unjust discrimination* in its method of car distribution, as against the plaintiffs, in violation of Section 3 of the Act to Regulate Commerce, is a "*conclusive*" finding of fact upon an administrative question, and that it is beyond the competency of the Courts to re-examine the same.

The Commission in this case found:

1. "But Falcon No. 2 was not placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal car equipment during the period of this action." (1st Report, Record, p. 64.)

This was a finding by the Commission upon *an administrative question*, that the defendant had not treated plaintiffs with equality as compared with Berwind-White Coal Mining Company, and that defendant had violated Section 3 of the Act to Regulate Commerce, known as the "Equality Section."

> 2. "For the reasons explained at some length in that case" (Hillsdale Coal & Coke Co. vs. Penna. R. R. Co) "those rules operated *as an undue discrimination against these complainants and we so find.* But for the present and for the reasons there explained, we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby." (1st Report, Record, p. 65.) (Italics ours.)

This was a finding by the Commission upon the administrative question before it, that the rules of car distribution enforced by the defendant unduly discriminated against plaintiffs, and therefore that defendant had violated Section 3 of the Act to Regulate Commerce.

3. By its order of March 7th, 1910 (Record, pp. 36, 37), the Commission found as follows:

> "It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminated against the complainants and other coal operators similarly situated, and is in violation of the third section of the Act to Regulate Commerce." (Order, Record, p. 66.)

This fact stated in the order of the Commission is a finding upon the administrative question before it, and should be given the effect required by law as above shown.

4. By its Supplemental Report (Record, p. 14), the Commission states:

> "We find that by reason *of the discriminations ascertained and set forth in our report* in Jacoby v. P. R .R. Co., 19 I. C. C. 392, the complainants *were* damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28th, 1907." (Supplemental Report, Record, p. 67.) (Italics ours.)

5. By its Supplemental Order (Record, p. 26), the Commission recites that it has made full investigation, refers to its original report, supplemental report, and findings of fact, all of which are made a part of the order, and

> "It is ordered, That the above named defendant" (The Pennsylvania Railroad Company) "be and it is hereby authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 20th, 1907, *as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust,* as more fully and at large appears in and by said reports of the Commission." (Supplemental Order, Record, pp. 69, 70.) (Italics ours.)

There cannot be a doubt that the Commission found that defendant had unjustly discriminated against plaintiffs; that the rules of car distribution enforced by defendant unjustly discriminated against plaintiffs; that defendant violated Section 3 of the Act to Regulate Commerce; and that this finding of the Commission was a finding upon an administrative question, which under the law was *"conclusive"* and could not properly be re-examined by the Courts.

The Commission having made this finding of violation of Section 3 of the Act, the District Court properly charged the jury, as to the effect to be given thereto, as follows:

> "The Commission has decided the manner of distribution of coal cars, and that is a question with which you have nothing to do. Their findings on that subject are conclusive, as far as this Court and jury are concerned." (Charge—Record, p. 127.)

II. THE EFFECT TO FOLLOW FROM THE FINDING OF THE COMMISSION THAT THE DEFENDANT HAD VIOLATED SECTION 3 OF THE ACT TO REGULATE COMMERCE.

Section 8 of the Act to Regulate Commerce is as follows:

> "Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier *shall be liable* to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (Italics ours.)

This section, applied to the case now before this Court, brings us to the conclusion that the Commission, having found that the defendant violated Section 3 of the Act, in that it did what that Section prohibited, and this finding of the Commission being upon an admin-

istrative question and therefore to be taken as "conclusive" by the Courts, therefore, upon presentation of this finding of the Commission in the District Court, upon the trial of the case according to the procedure provided in Section 16, the Act to Regulate Commerce by Section 8 declares that "*such common carrier shall be liable.*"

As was said by this Court in *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121, at p. 127:

> "Section 3 of the Commerce Act makes it unlawful for the carrier to unduly prefer one shipper over another. Section 8 gives a right of action against the carrier for damages occasioned by his doing an act prohibited by the statute."

Of course, before recovery it was necessary for the plaintiffs to show that they were the "persons injured thereby", and what was "the full amount of damages sustained in consequence of any such violation of the provisions of this act", and this we will hereafter consider.

III. PLAINTIFFS PROCEEDED, AS WAS NECESSARY, BY COMPLAINT TO THE COMMISSION THAT THEY WERE INJURED BY DEFENDANT'S VIOLATION OF THE ACT, AND PRAYED FOR AN AWARD IN THE AMOUNT OF THE "DAMAGES SUSTAINED IN CONSEQUENCE OF * * * SUCH VIOLATION OF THE PROVISIONS OF" THE ACT.

If a person claims that a carrier is liable to him under Section 8 of the Act because he was injured by the carrier's "violation of the provisions of this act", and that he has "sustained" damages "in consequence of any such violation of the provisions of this

act", he has two forums open to him under Section 9 of the Act, which is as follows:

> "Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may *either make* complaint to the Commission as hereinafter provided for, *or may* bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the *two methods of procedure herein* provided for he or they will adopt," etc. (Italics ours.)

Under this section the plaintiffs had the option to proceed either before the Commission or in the Courts for the enforcement of the liability of the defendant to them under Section 8 of the Act. Thus, in the Mitchell case, 230 U. S. 247, at page 257, it is said:

> "Section 9 gives the plaintiff the option of going before the Commission or the Courts *for damages occasioned by a violation of the Statute.* But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the *practice or the rate was* thus unreasonable and therefore illegal and prohibited." (Italics ours.)

This option of the plaintiffs is limited, however. as just indicated, by the decision of this Court in the Abilene Cotton Oil Co. case, 204 U. S. 426, and other cases, requiring that when the question involved requires the exercise of administrative discretion for its determination, it is necessary to first have an order

from the Commission "that the practice or the rate was thus unreasonable and therefore illegal and prohibited."

The present case was based upon the determination of the question, in the exercise of administrative discretion, whether the defendant had violated Section 3 of the Act and it was, therefore, necessary that the plaintiffs should in the first instance proceed before the Commission, and in doing so they, under Section 9 of the Act, made "complaint to the Commission * * * for the recovery of *the damages for which such common carrier may* be liable under the provisions of this Act", and as this Court said (Mitchell case, *supra*):

> "Section 9 gives the plaintiff the option of going before the Commission or the Courts *for damages* occasioned by a violation of the statute." (Italics ours.)

This procedure before the Commission was what was called by Judge Lanning, in *Morrisdale Coal Co. vs. Penna. R. R. Co.*, 183 Fed. 929, at page 934, "a substituted right of procedure before the Commission", instead of "a common law right of action", and by Section 9 is spoken of as one of "*two methods of procedure*".

In *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121, this Court said (p. 129):

> "While the Hepburn Act, as a convenience to shippers, permitted suits on Reparation Orders to be brought in the Federal court of the District where the plaintiff resided or the Company had its principal office; and while the act of 1910 (36 Stat. 554) in further aid of shippers, permitted suits on Reparation Orders to be brought in state or Federal courts, it made no change in Secs. 8 and 9 which, as shown above, gave the shipper the option to make complaints to the Commission or to bring suit in a United States court.

"2. But Secs. 8 and 9 standing alone might have been construed to give the Federal courts exclusive jurisdiction of *all suits for damages* occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the Commerce Act. And, evidently, for the purpose of preventing such a result, the Proviso to Sec. 22 declared that 'nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies'."

"That proviso was added at the end of the statute,—not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections,—but to preserve all existing rights which were not inconsistent with those created by the statute." (Italics ours.)

And again (p. 131), this Court said:

"Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in Sec. 9."

In *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456, a case arising out of the same discriminatory practices here in question as applied by the same defendants to other shippers in the same region, this Court said (p. 468):

"1. The question whether the rule or method of car distribution practiced by the railroad company was unjustly discriminatory was one which the Commission had authority to pass upon. * * * Further, by reason of the nature of the question involved in an attack upon the rule or method of

the Company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule. * * * *

The Commission also had authority to make examination and report upon *the amount of damages* which the plaintiff had suffered from the unjust discrimination alleged in its complaint. We deem the provisions of the Act to be clear upon this point. See Secs. 8, 9, 13, 16. (Italics ours.)

And again (p. 471), this Court said:

"It is said that the present action is brought to recover damages caused by the violation or discriminatory enforcement of the carrier's own rule, and that in such case, no administrative question being involved, resort to the Commission was not necessary. And this, it is urged, was held in *Penna. R. R. v. Puritan Coal Co.*, 237 U. S. 121. See also *Illinois Central R. R. v. Mulberry Hill Coal Co.*, decided June 14th, 1915, *ante* P. 275. The distinction, however, is apparent. In the cases cited the plaintiff had not invoked the jurisdiction of the Commission. In this case, it had done so. It went before the Commission, with its complaint under the Act, assailing the rule of the Company, and it secured from the Commission a finding as to the illegality of the rule and the violation of the Act. This proceeding established the character of the claim so far as interstate transactions were concerned, and it could be prosecuted solely under the Federal Statute. * * * * The Federal Statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, *that statute determined the extent of the damages it was entitled to recover* with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court and there to secure treble damages under the State statute with respect to the same transactions." (Italics ours.)

Plaintiff-in-error, in its brief (p. 44), has endeavored to distinguish the finding of this Court in the Clark case, saying:

> "All that this Court decided in that case was that, when a shipper invoked the jurisdiction of the Commission in order to secure a finding as to the legality of a carrier's rule of car distribution, it thereby established the character of its claim for damages resulting from the enforcement of an unjust rule so far as its interstate transactions were concerned, and, consequently, such a claim could be prosecuted solely under and in accordance with the provisions of the Interstate Commerce Act."

But the opinion of this Court in the Clark case (arising out of the very same discrimination here complained of) is most pertinent. What this Court decided in the Clark case was, that the shipper, complaining of discriminatory practices in car distribution, could either bring suit at common law or in a State court, or could proceed before the Interstate Commerce Commission to obtain an administrative finding of fact as to the discriminatory character of the practices complained of; but, having gone before the Commission, and having obtained before it a finding that Section 3 had been violated, the shipper could no longer pursue any other remedies than those prescribed by the Act for a violation of its provisions. In so ruling, this Court clearly contemplated that the Commission's administrative finding as to the discriminatory nature of the practices in question and the consequent violation of Section 3 was conclusive; otherwise a shipper, after electing his remedy and thereby debarring himself from a proceeding on the original facts at common law or in a State tribunal, might be met, on appeal, with a contention that the Commission was wrong, and

that Section 3 had not been violated, this being based on facts not adduced before the Commission, or on only a few of the facts there presented; a result so remarkable that it was manifestly never contemplated by this Court.

The case of *Penna. R. R. Co. vs. International Coal Mining Co.*, 230 U. S. 184, illustrates the case of the plaintiff, who, proceeding under Section 2 of the Act, exercised his option under Section 9, to adopt the other, of the "two methods of procedure", and sue, in the first instance, in the Courts, since there was no question involved which required the exercise of administrative discretion. The two procedures are entirely unlike, either may be adopted in appropriate cases, but the rules of evidence upon the trial in Court, which must ultimately come under both procedures, are entirely different, when the petition is filed in Court to "enforce an order for the payment of money" (Section 16), from the rules as to proof when the action is in Court in the first instance, as we will hereafter show.

IV. PROCEDURE BY PLAINTIFFS BEFORE THE COMMISSION WAS IN THE APPROPRIATE AND NECESSARY FORUM, AND WAS AUTHORIZED BY SECTION 9, AND FOLLOWED THE PROVISIONS OF SECTION 13.

Plaintiffs' case involving a question of administrative discretion, they necessarily proceeded before the Commission "for the *recovery of the damages for which such common carrier may be liable under the provisions of this Act*" (Section 9), and the procedure at the time of complaint, in 1907, was provided by Section 13 of the Act, as follows:

> "Sec. 13. That any person, firm, corporation or association or any mercantile, agricultural, or

manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier, subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier within the time *specified shall make reparation* for the injury alleged to have been done, said carrier shall be relieved OF LIABILITY to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper", etc. (Italics ours.)

The plaintiffs in this case followed Section 13 and filed their petition, complaining of such violation by the defendant of Section 3 of the Act, as made defendant liable under Section 8, and further claiming damages which they sustained, and which, if proven, entitled them to recover, (Section 8). They were authorized to proceed for such purpose by Section 9, and Section 13 required the Commission to investigate the plaintiffs' "particular" claim, unless "within the time specified" such common carrier, defendant, "shall make *reparation* for the injury alleged to have been done."

In this case the defendant did not "make reparation", and therefore the Commission made the investigation required of it by Section 13.

V. DUTY OF THE COMMISSION AFTER INVESTIGATION OF PLAINTIFFS' COMPLAINT.

The Commission having made investigation of plaintiffs' complaint in this case, and having heard all the evidence presented by both plaintiffs and defendant, and the argument of counsel, was required by Section 14 to make a report, as follows:

> "Sec. 14. That whenever an investigation shall be made by said Commission, it shall be *its duty* to make a report in writing in respect thereto, which *shall* state the conclusions of the Commission, together with its decision, order, or requirement in the premises; *and in case damages are awarded, such report shall include the findings of fact on which the award is made,"* etc. (Italics ours.)

The Commission is required to make a report in writing, which report shall (1) state the conclusions of the Commission, "together with its decision, order or requirement in the premises"; and (2) "in case damages are awarded, such *report shall include"* along with the "conclusions", "decision, order or requirement" of the Commission, "the findings of fact on which the award is made", all to be in one report, but only "the findings of fact on which the award is made" are required to be included.

When we consider what are "the findings of fact" to be *included* in the report as the basis upon "which the award" of damages "is made", these must be such facts as by Section 8 are made the basis (1) of defendant's liability; (2) of plaintiffs being "injured thereby", and (3) of the "full amount of damages sustained in consequence of" the violation by defendant "of the provisions of this act". If these facts are found by the Commission, there can be no doubt that

they are the facts upon which, the Act declares, the "award" of damages shall be made", for Section 16 of the Act provides:

> "Sec. 16. That if, after hearing on a complaint made as provided in Section 13 of this Act, the Commission shall determine that any party complainant is entitled to an *award* of damages under the provisions of this Act *for a violation* thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." (Italics ours.)

The basis of the "award of damages" which the Commission is required to make under this Section 16 is (1) the "violation" of the provisions of the Act by defendant; (2) that plaintiffs are entitled to the award because "injured thereby", and (3) the "sum to which" plaintiffs are entitled as "an award of damages".

These are the "findings of fact" which Section 14 requires the Commission to "include" in its report with its "conclusions", "decision, order or requirement."

In *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412, this Court said (p. 427):

> "Another objection which was directed against the orders as well as the reports is that they contain no findings of fact or at least not enough to sustain an award of damages. The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts, that is to say, the primary facts from which through a process of reasoning and inference the ultimate facts may be determined. We think this is not the right view of the statute and that what it requires is a finding of the

ultimate facts—a finding which, as applied to the present case, would disclose (1) the relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper from November 1, 1900, to August 1, 1901; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages. Upon examining the reports as set forth in the record, we think they contain findings of fact which meet the requirements of the statute and that the facts stated in the findings, if taken as *prima facie* true, sustain the award of the Commission."

Remembering that the Meeker case was a suit for damages arising from the charge of discriminatory rates, while the present suit is to recover damages arising from discriminatory practices in the distribution of cars, it will be found that the reports and orders of the Commission put in evidence in the present case contain findings of fact analogous to those contained in the reports and order in evidence in the Meeker case; And there can, therefore, be no doubt as to the sufficiency of such facts to take the case to the jury.

The plaintiff in error, in its brief filed in this case, has sought to distinguish the Meeker case on the ground that the report in that case showed, *inter alia*, "whether and in what way unjust discrimination was practiced

against the shipper." This, it argues, indicates that the reports and orders, offered in evidence, in order to be sufficient must show in detail just how the discriminatory rate or practice was applied. Of course the whole trend of this court's reasoning in the Meeker cases, sufficiently indicates that this court had no such intention as the plaintiff in error imputes to it. It is unnecessary, however, to argue this question, since this court in the more recent case of *Mills v. Lehigh Valley Railroad Co.*, 238 U. S. 473, has ruled upon this very matter. In that case, a proceeding was instituted before the Commission by a shipper, alleging that certain rates were excessive, unreasonable and unjustly discriminatory. "The first report of the Commission was concerned only with the rates which should be charged. No reparation was allowed, and no findings whatever made as to damages" (p. 478). A second report was then filed. This report set forth (p. 478), that:

> "In the report made by this Commission following an inquiry into the reasonableness of the rate of $2 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey the rate was found excessive, and the defendants were ordered to establish a rate not to exceed that contemporaneously applying on shipments of iron ore between the same points. Reparation was denied. *Naylor & Co. v. L. V. R. R. Co.*, 15 I. C. C. Rep. 9.
>
> "Pursuant to the Commission's order the defendants reduced the rate on pyrites cinder to $1.45, the rate on iron ore. The complainant thereupon filed a motion for rehearing upon the question of reparation, and after consideration by the Commission the motion was granted. Additional evidence was taken and the parties were heard in oral argument.
>
> "We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the

shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations. *Detroit Chemical Works v. N. C. Ry. Co.*, 13 I. C. C. Rep. 357; *Same v. Erie R. R. Co.*, 13 I. C. C. Rep. 363."

The report then proceeded to fix the sums which the various defendants would be "required to refund to the complainant * * * * as reparation for the collection of unreasonable charges on" so many carloads of the product shipped. This was followed by an award. Suit was brought on the award and judgment rendered for the amount named by the Commission. On appeal to the Court of Appeals, judgment was reversed on the grounds that (p. 477):

> "First, that there were no sufficient findings of fact in the reports of the Commission, as required by the statute; and, second, that the plaintiffs had failed to present any evidence which made out a *prima facie* case of damage sustained. That is, it is said that if the statements in the first report of the Commission could be regarded as findings of fact within the meaning of the statute so as to make them *prima facie* evidence of the facts found, they were not sufficient to support the plaintiffs' claim; and that there were no facts found in the second report which entitled the plaintiffs to go to the jury."

This court, in reversing the judgment of the Circuit Court of Appeals, held, in effect, that the second report of the Commission (quoted in part *supra*), was in itself a sufficient finding of facts to take the case to the jury, saying (p. 480):

> "This report, it will be observed, shows the relation of the parties as shipper and carrier in

interstate commerce; the general character of the traffic involved and the amount of the shipment with respect to which reparation was claimed; the determination that the rate exacted (which was specified) was unjust and unreasonable to the extent that it exceeded the established rate (also specified); and, further, the determination that the companies respectively should pay a stated amount 'as reparation for the collection of unreasonable charges' on the quantities mentioned. It is at once apparent that these findings meet the test laid down in the *Meeker case* unless it can be said that they were insufficient as to the amount of damages suffered. Thus, there would seem to be no room for question that the finding that the rate charged was unreasonable is a sufficient finding. The Commission stated: 'We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton.' It is insisted that, in view of the provisions of the first order, and the Commission's description of it in the second report, the essential basis of the ruling was not the inherent reasonableness of the rate established but its relation to the rate on a competitive commodity. We think, however, that the specific finding in the second report that the rate exacted 'was unjust and unreasonable' to the extent specified, *was a finding as to the ultimate fact of unreasonableness which should be taken precisely as made.* The finding in this respect is substantially the same as that in the second *Meeker case* (236 U. S. 434, 435, 436)." (Italics ours.)

The reports and findings of the Commission in the Mills case were practically identical with those in evidence in the present case. In the Mills case, there was, first, a general report containing certain findings of fact and a discussion of those facts, together with a determination of the unjust and discriminatory char-

acter of the rates charged; this was followed by a short report, reciting merely the fact that the rates were unjust and discriminatory, and determining the amount of complainant's damage; and this was followed by a formal award of reparation. Exactly the same course was followed by the Commission in the present case, the only difference being that, in the present case, the Commission passed upon a question of practices and not of rates. But it was expressly held by this Court in *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456 (p. 470), that the authority of the Commission to determine the discriminatory nature of practices relating to car distribution and to award damages to persons injured thereby, is just as certain as its power to determine questions as to rates and to award damages for injustice or discrimination in connection therewith.

We have shown the Court the findings of fact made by the Commission in this case on which Section 8 declares the liability of the defendant. We now proceed to the "findings of fact", showing liability to the plaintiffs and "the sum to which" they are "entitled".

VI. THE DEFENDANT HAVING VIOLATED THE PROVISIONS OF THE ACT, THE COMMISSION FOUND THAT THE PLAINTIFFS WERE "INJURED THEREBY" AND SUFFERED LOSS AMOUNTING TO $21,094.39, WITH INTEREST FROM JUNE 28TH, 1907, WHICH AMOUNTED TO THE SUM COVERED BY THE JUDGMENT OF THE DISTRICT COURT.

By its Supplemental Report of March 11th, 1912, (Record, pp. 18, 67, 68), the Commission found as follows:

"We find that by reason of the discrimina-

> tions ascertained and set forth in our report in Jacoby v. P. R. R. Co., 19 I. C. C. 392, *the complainants were damaged* to the *extent of $21,094.39*, which *they are entitled to recover* with interest from June 28th, 1907." (Italics ours.)

In this finding of fact is found every essential element upon which to show, under Section 8, the liability of the defendant *to the plaintiffs* and the amount of damage "sustained" by the plaintiffs, and it also is the essential finding of fact "on which the award is made", and which by Section 14 must be *included* by the Commission in its report.

The Commission, however, went further and found the detailed facts which "measures the loss on the tonnage which the complainants were unable to ship" (Record, p. 68 [d]), and which constituted the "basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question." (Supplemental Report, Record, pp. 67, 68.)

The Commission then entered its Supplemental Order (Record, pp. 26, 69), as required by Section 16, directing the defendant to pay to plaintiffs the sum found by it

> "as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission."

In *Mills vs. Lehigh Val. Ry. Co.*, 238 U. S. 473, this Court said (p. 481):

> "As to the amount of damage sustained, there would be no question if the Commission had found, as in the case last cited, that the shipper 'was damaged' to the amount mentioned. The distinction attempted to be drawn is that in the case referred to there was a statement that the shipper 'was

damaged' while in the present case the Commission held that he was entitled to the stated amount 'as reparation'. In both cases, the amount actually allowed was the difference between the amount charged and that which would have been payable at the rate sanctioned. The difference between the findings in the two cases, we think, is merely in the form of words used.

"When the Commission made the award *'as reparation'* they undoubtedly expressed the decision as a matter of ultimate fact, that there was injury to this extent to be repaired. No other intelligent construction can be put upon their statement. If, as was held in the second *Meeker case*, a finding of the amount of damage as a finding of ultimate fact is sufficient, the expression of that finding is not confined to a particular formula. What the Commission decided was that the shippers were entitled to reparation, that is, to be made whole, to be compensated for a loss because of an illegal and unreasonable exaction, and the amount which they stated as the sum to be paid 'as reparation' on the specified shipments was the amount which they found necessary to accomplish the reparation,—to afford the compensation. The statute was not concerned with mere forms of expression and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the Commission effect as *prima facie* evidence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, *prima facie* the damage is shown; and, according to the fair import of its decision, the Commission did find the amount of damage in this case."

In the present case the Commission found that "the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28th, 1907", (Record, p. 18); and subse-

quently ordered defendant to pay this sum "as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission." (Record, p. 26.)

We have shown from the reports and orders of the Commission the findings of fact which were essential (1) to establish the liability of the defendant; (2) to show that plaintiffs were "injured thereby", and (3) the amount in damages "sustained" by plaintiffs; which were the essential findings of fact under Section 8 upon which to base liability of the defendant to the plaintiffs for the amount found, and which were the findings of fact under Section 14, *to be included* in the report and "on which the award is made". We have also shown the order of the Commission under Section 16, "directing the carrier to pay to the complainants the sum to which he is entitled on or before a day named", and it remains to show the effect to be given to these findings of fact and orders of the Commission in the further conduct of plaintiff's case.

VII. THE ACT, SECTION 16, PROVIDES A STATUTORY PROCEEDING AGAINST A DEFENDANT CARRIER, WHO "DOES NOT COMPLY WITH AN ORDER FOR THE PAYMENT OF MONEY", AND DECLARES THE EFFECT TO BE GIVEN, BY THE COURTS, TO "FACTS" STATED IN THE "FINDINGS AND ORDER OF THE COMMISSION."

Section 16 of the Act provides:

> "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant or any person for

whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State Court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. * * * * All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, AND A PETITION FOR THE ENFORCEMENT OF AN ORDER FOR THE PAYMENT OF MONEY shall be filed in the Circuit Court or State Court within one year from the date of the order, and not after."

This Section fixes and establishes the *statutory procedure.* It is not the ordinary suit for damages, at common law, but "A PETITION FOR THE ENFORCEMENT OF AN ORDER FOR THE PAYMENT OF MONEY."

Section 16 also provides:

> "Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." etc.

This, under the construction put thereon by this Court, fixes the effect to be given to the facts in the findings and order of the Commission upon the "petition for the enforcement of an order for the payment of money."

We have shown (*supra*) that the finding of the Commission that defendant had been guilty of "unjust discrimination" and had violated Section 3 of the Act, was a finding of fact "conclusive" in the Courts,

and that upon such evidence, Section 8 declares that the carrier "shall be liable". We now show that the finding by the Commission of the fact that plaintiffs were damaged and the amount thereof, must have been taken by the jury as *prima facie* correct, and unless they believed that the defendant's evidence rebutted the *prima facie* effect to be given to the findings of fact by the Commisison, they should, in view of Section 8 of the Act, have found for the plaintiffs. This was the view presented in the charge of the learned trial Court, and *upon this issue of fact* the jury found for the plaintiffs, and we submit that there was no error in the lower Court prejudicial to the defendant, and that the judgment should be affirmed.

In the report of the Committee on Interstate Commerce, of January 18th, 1886, which is a review of the purposes of the Act to Regulate Commerce, as originally passed by Congress, it is said (p. 214):

> "Nor is it proposed to compel any citizen to rely solely upon the Commission recommended by this Committee, or to debar him from seeking redress from grievances from the judicial tribunals of the United States if he shall prefer to have recourse to them. On the contrary, it is expressly provided that he shall be free to pursue his remedy at common law or *under the statute herein recommended,* at his own discretion. It is not proposed to in any manner restrict the choice of remedies now available, but it is proposed to provide *additional means of obtaining redress with much less difficulty* and expense, and to render those already existing very much more effective.
>
> "This can best be accomplished, it is believed, *by making the reports and recommendations of the Commission prima facie evidence as to the facts found in all cases which it investigates.* This would do more towards placing the shipper upon an equality with the carrier in a legal controversy

than anything else that has been suggested, and would to a considerable extent, obviate the almost insurmountable difficulties now encountered by the shipper.

"With such a change in the rules of evidence, a favorable report by the Commission *would substantially establish the case of the complainant, should judicial proceedings become necessary, as it would lift from his shoulders the burden of proof and transfer it to the carrier.*" (Italics ours.)

That the purpose of the Act was to make "a favorable report of the Commission * * * * *establish the case of the complainant should judicial proceedings be necessary,*" as stated in the report above set forth, was declared by this Court in the *Mitchell Coal Co.* case, 230 U. S. 247, at page 258, as follows:

"Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial, and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the Act given its day in Court and the right to a judicial hearing, (March 2, 1889, 25 Stat. 855, 859, c. 382).

"In considering the administrative questions as to reasonableness, the elements of the problem are the same, whether they involve the validity of obsolete allowances, discarded tariffs, or current rates *and practices.* In both classes of cases there is a call for the exercise of the rate-regulating discretion and the same necessity for having the matter settled by a single tribunal." (Italics ours.)

In *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456, the Court said (p. 469):

> "There is nothing in the Act to suggest that the damages which may thus be ascertained are only those arising from unreasonable or unjustly discriminatory rates. Rules as to car distribution that are unjustly discriminatory are within the purview of Section three, and damages thereby occasioned, as well as those due to the exaction of unreasonable rates, arise from the violation of the Act and their ascertainment is within the scope of the Commission's authority."

So that the effect to be given to the findings of the Commission is equally applicable to questions affecting rates or practices, and when this case was submitted to the jury upon the findings of fact by the Commission, and the evidence presented by defendant and plaintiffs, a simple issue of fact was presented upon which the jury found for the plaintiffs, and a careful examination of the charge of the learned Judge of the Court below will show that he followed carefully the view of the law which is above presented, and which has been affirmed by this Court.

The effect which is to be given to such reports and findings of the Commission, including the award of damages has been finally established by this Court in *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412. In that case this Court said (p. 428):

> "But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really disclose is that the Commission, 'upon consideration of the evidence adduced upon the hearing upon the question of reparation' found (a) that by reason of the unjust discrimination resulting from giving the rebate to the Lehigh Valley Coal Company, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid from Nov. 1, 1900, to Aug. 1,

1901, and what they would have paid had they been dealt with on the same basis as was the Coal Company, and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. * * * * * the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it."

And in *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 434, where the entire evidence presented by the plaintiff consisted of the report, findings and award of the Commission, this Court said (p. 439):

> "The case made by the evidence rightly admitted was such as, in the absence of any opposing evidence, and there was none, clearly entitled the plaintiff to a verdict for the amount claimed. Every fact essential to a recovery, save the service of the reparation order and the refusal to comply with it, was *prima facie* established by the findings and order of the Commission and these could not be rejected by the jury in the absence of any countervailing evidence."

The same rule is as forcibly and even more explicitly announced in *Mills vs. Lehigh Valley Railroad Com Company*, 238 U. S. 473.

The District Court allowed to counsel for plaintiff a counsel fee of twenty-five hundred ($2500.00) dollars for services in the proceedings before the Interstate

Commerce Commission, which allowance, under the case of *Meeker & Co. vs. Lehigh Valley Railroad Company*, cannot be sustained, and we ask this Court to correct the judgment of the District Court in that particular.

After so correcting the judgment of the District Court we submit that the same should be affirmed.

THE BRIEF FOR PLAINTIFF-IN-ERROR.

1. In the brief of learned counsel for plaintiff-in-error, the contention is made (page 17) that the:

> "evidence adduced by defendants-in-error" is "insufficient to establish a *prima facie* case."

In reply to this, we refer to our presentation in this brief of the facts found in the report, supplemental report and orders of the Interstate Commerce Commission, and submit that thereby, every essential fact was found by the Commission, which was necessary under the decisions of this Court to establish the discrimination practiced by the carrier, the injury to the defendants-in-error and the amount of their damage. The complaint of the counsel for plaintiff-in-error seems to be that the Commission's report does not set forth in detail the evidence upon which the finding or conclusion of the Commission was based. We submit that under the decisions of this Court in the Meeker case, 236 U. S. 412, at p. 427, and the Mills case, 238 U. S. 473, at p. 481, this was unnecessary. It was necessary for the defendants-in-error to show to the Interstate Commerce Commission, in what manner they had been unfairly treated and the details thereof, and this was clearly presented to the Commission; but it was entirely unnecessary for the Commission to recite at length in its report the details of how, day by day,

the discrimination was practiced in the car distribution. The essential and *ultimate facts* were found by the Commission, that the carrier had unjustly discriminated against the defendants-in-error, that they were injured thereby and the amount of their damages, which establishes a *prima facie* case for the defendants-in-error.

Complaint is made by counsel for plaintiff-in-error that:

> "The Commission nowhere found what number of cars the plaintiff-in-error distributed in the region in which the defendants-in-error's mine was located, what number of these were available for allotment and distribution among shippers generally, nor what the relation was between the capacity of the defendants-in-error's mine and the capacity of all the mines in the region, all of which facts were not only important but essential in arriving at any determination as to the number of cars which the defendants-in-error should have received." (Brief, p. 18.)

Evidence covering every one of these suggestions was important, and was presented to the Commission, and the Commission found from this evidence the fact that the carrier had unjustly discriminated, in its car distribution, against the defendants-in-error, and this was the ultimate fact which it was necessary that the Commission should find before the defendants-in-error could recover, but it was unnecessary for the Commission to recite the evidence upon which this *ultimate fact* was based.

Counsel for plaintiff-in-error say (page 19):

> "The Interstate Commerce Act, while authorizing actions of the character of the present one, requires that they 'shall proceed in all respects like civil suits for damages, except that on the trial

> of such suit the reports and orders of the Commission shall be *prima facie* evidence of the facts therein stated'. It results from this that the plaintiff or petitioner in such an action as the present one, is not relieved from the burden of proving every fact which in an action of law for damages he would be required to prove."

It would seem that the view here expressed is that the defendants-in-error could not rely upon the *ultimate facts* of discrimination, injury and damage found by the Commission, to establish a *prima facie* case, but that in proceeding to enforce the order of the Commission, it was necessary to again offer in Court, in order to make a *prima facie* case, all of the evidence upon which the Commission's ultimate conclusion of fact was based. Such a position, we submit, is entirely disposed of by the cases decided by this Court and referred to above.

2. Counsel for plaintiff-in-error say (Brief, p. 23):

> "Even if the reports of the Commission established a *prima facie* case, evidence adduced by plaintiff-in-error established that the defendants-in-error were not entitled to the cars which the Commission held they should have received."

This is an effort to negative the finding of the Commission upon the administrative question of what system of car distribution should have been in effect, and what cars in the service of the carrier should have been distributed thereunder, and what percentage thereof the defendants-in-error were entitled to. The finding of fact by the Commission that the system of distribution of cars practiced by the plaintiff-in-error was unjust and unduly discriminatory, as against the defendants-in-error, and the further finding of what

should have been the system of distribution, and what cars should have been distributed thereunder, was an administrative finding of the Commission, and we submit that, under the cases referred to in this brief, such finding was conclusive in the Courts. But even if it was not conclusive, the plaintiff-in-error presented its evidence to the jury, and the jury found for the defendants-in-error, and we submit that this Court will not now review the system of car distribution and reverse the Commission's administrative conclusion thereon, supported by the verdict of the jury.

In this case, before the Commission, the preferences in car distribution to the Berwind-White Coal Mining Company were clearly shown, and, while there is nothing to justify the conclusion of counsel for plaintiff-in-error that the Commission based its award of damages, on the difference in treatment between the Berwind-White Company and the defendants-in-error, counsel for plaintiff-in-error make this assertion, and then cite the case of *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, and say:

> "In that case, this Court in effect determined that the damages of a shipper who had been charged discriminatory rates, were not to be measured by the amount of the preference extended to another shipper, but by the amount of the damage which the complaining shipper had sustained as the result of the preferential rates accorded to his competitor."

It is submitted that the case above cited does not sustain this statement of counsel for plaintiff-in-error, for the Court there said (at page 203):

> "The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be *the same as the rebate*, or less than the rebate, or many times

> greater than the rebate, but unless they were proved, they could not be recovered." (Italics ours.)

The damages of the defendants-in-error here were clearly proven before the Commission, and it found what those damages were, and it is no answer to this finding for the counsel for plaintiff-in-error to attempt to show that this amount measures the preferential treatment of the Berwind-White Company over the defendants-in-error in the car distribution. The record before the Commission is not before this Court. On the trial we agreed that the counsel for the plaintiff-in-error might put in the *entire record* before the Interstate Commerce Commission, but he declined to avail himself of this suggestion (Record, p. 73).

3. Counsel for plaintiff-in-error also say (p. 38) that the:

> "number of cars to which the defendants-in-error were entitled should have been ascertained with reference to the rule of distribution in force during the period of the action, and not with reference to a rule subsequently promulgated by the Interstate Commerce Commission."

The result of this proposition would seem to be that although the defendants-in-error may have been damaged by the unlawful discrimination practiced upon them, that they could not recover damages therefor, but could only recover damages for injury suffered, after the Commission had ascertained what, in its opinion, was a fair system of car distribution, if the carrier did not thereafter carry out the Commission's view. The practical result of an affirmance of this view would be so grotesque that we hardly think it necessary to further discuss it.

4. Counsel for plaintiff-in-error further say (p. 44):

> "Reports and orders of the Commission as a whole wrongfully admitted in evidence."

This contention of counsel for plaintiff-in-error is amply covered by the case of *Meeker vs. Lehigh Valley R. R. Co.*, and the case of *Mills vs. Lehigh Valley R. R. Co.*, above referred to.

5. Counsel for plaintiff-in-error say (Brief, p. 48) that the "award" is "invalid because of failure of Commission to find that the amount thereof was properly payable to the defendants-in-error."

Referring to the Record (p. 18), it appears that the first finding by the Commission is as follows:

> "We find that by reason of the discriminations ascertained and set forth in our report in Jacoby vs. P. R. R. Co., 19 I. C. C. 392, the complainants *were damaged to the extent of $21,094.39*, which they *are entitled to recover* with interest from June 28th, 1907." (Italics ours.)

It is urged, however, that the following appears at the close of the report (Record, p. 19):

> "We further find that the complainants in the sale of their mine, realized a profit of $7500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded."

And it is argued that this last paragraph negatives the finding of the report that the "complainants were damaged to the extent of $21,094.39, which they are entitled to recover."

This same question of coal remaining in the ground as a subject of future sale, was considered by the Su-

preme Court of Pennsylvania in *Hillsdale Coal & Coke Co. vs. Pennsylvania R. R. Co.*, 229 Pa. 61, where the Court said (at page 68):

> "Counsel for appellant argue that because, as a result of defendant's discrimination, the coal of the plaintiff was left in the ground, and might be available for future shipment, and as there was no evidence that the prices which prevailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for its coal when it might be shipped in the future, less than it would have realized if shipped during the period of the action. But the burden was upon defendant, to show anything of this kind by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose."

In this case the plaintiff-in-error had the benefit of the Commission's finding of fact, but the jury did not consider that the sale of the property in any way affected the damages already sustained, and which had been found by the Commission. The matter was not made the basis of an objection to the supplemental report or award, and was not made the basis of a request for a charge or an assignment of error, and we submit that this case should not be reversed on that ground.

Respectfully submitted,

WM. A. GLASGOW, JR.,
Counsel for Defendants-in-error.

No. [redacted]22

OCTOBER TERM, 1915.

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IN THE

Supreme Court of the United States

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

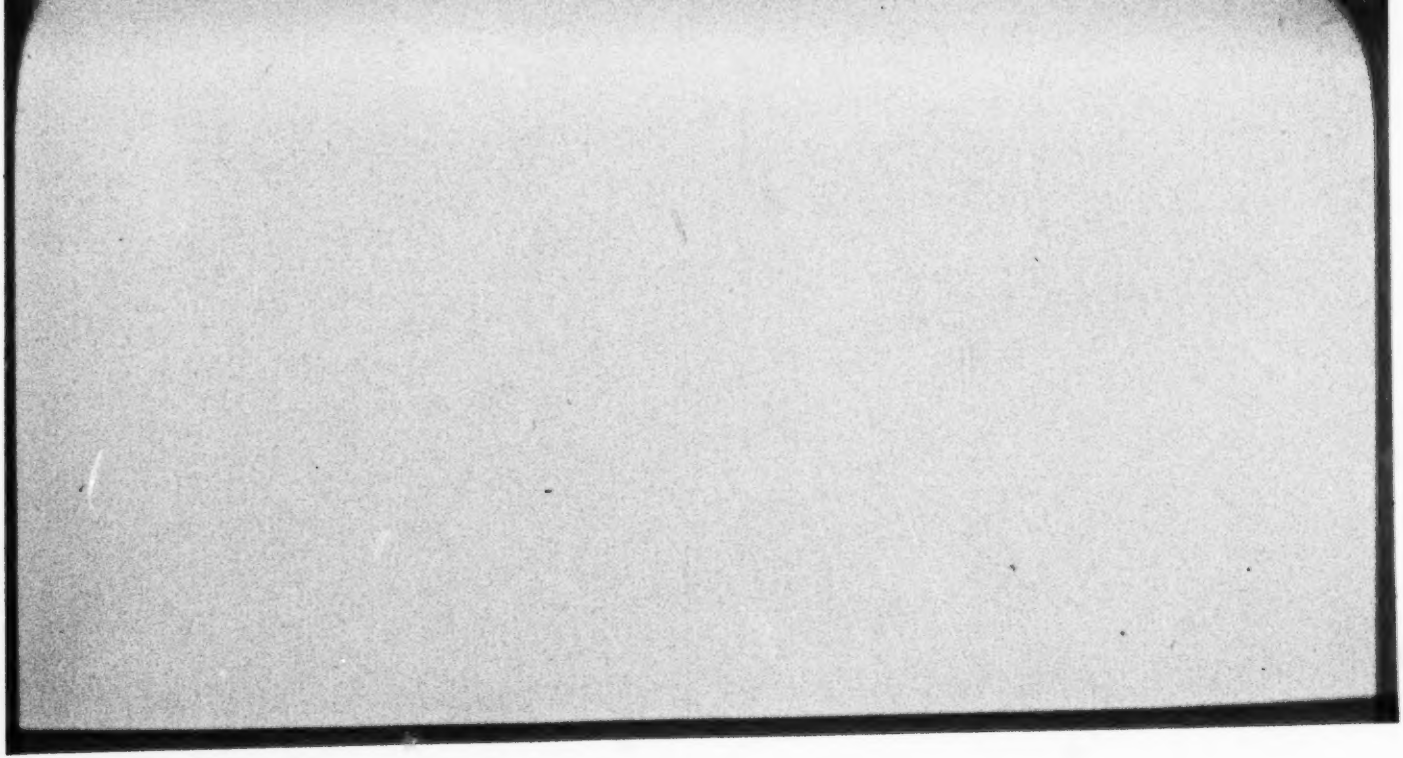
vs.

W. F. JACOBY & COMPANY, Defendant in Error.

On Certificate from and Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITION OF THE PENNSYLVANIA RAILROAD COMPANY FOR A REARGUMENT OF THIS CASE OR FOR A MODIFICATION OF THE JUDGMENT.

FREDERIC D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Plaintiff in Error.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915. NO. 139.

Pennsylvania Railroad Company, Plaintiff in Error,

vs.

W. F. Jacoby & Company, Defendant in Error.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION OF THE PENNSYLVANIA RAILROAD COMPANY FOR A REARGUMENT OF THIS CASE OR FOR A MODIFICATION OF THE JUDGMENT.

The Pennsylvania Railroad Company, the plaintiff in error, respectfully petitions the Court to restore this case to the Docket, in order that it may be argued before a full Bench, and assigns the following reasons in support of this petition.

The District Judge, however, declined to instruct the jury that the award was invalid, even though they should find that the defendants in error, had distribution been made of its cars by the plaintiff in error in accordance with the rule prescribed by the Interstate Commerce Commission, would not have received the cars which the Commission found should have been received, and further declined to instruct the jury that if they should find that the Commission reached its conclusion as to the number of cars which the defendants in error should have received with reference to a number received by certain mines, then the basis for the Commission's conclusion and award was an erroneous one, and the defendants in error could not consequently recover the amount of the award.

Another question or issue involved in the present case, the determination of which would have a general application, is this:—

Under the rule of distribution promulgated by it, the Interstate Commerce Commission divided the cars on the lines of the plaintiff in error into two classes, "assigned" and "unassigned," the former comprising the individual cars of shippers and fuel cars of the plaintiff in error and other railroad companies, and the latter all other cars.

The Commission held that the assigned cars were not allottable among shippers generally, the plaintiff in error being bound to place the individual cars at the mines of the owners, and being at liberty to place the fuel cars at whatever mines were furnishing fuel supply coal, and that consequently the only allottable cars were the unassigned cars, but that, in determining the number of these which each shipper was to receive, regard must be paid to any assigned cars which had also been delivered to such shipper.

In the proceeding in which the Commission reached this conclusion an effort was made upon behalf of the

Complainants to have the Commission hold that each shipper was entitled to receive a *pro rata* share of the whole number of cars placed at the mines, including therein both assigned and unassigned cars, but in respect to this the Commission said:—

> "Although the mine owning private cars or to which company or foreign railway fuel cars are consigned is entitled to receive them even though in excess of its ratable proportion of all available coal car equipment, nevertheless the defendant will be required in the future to count all such cars against the distributive share of the mine so receiving them. *It is scarcely necessary to add that the Complainants' second request for a finding and for an order requiring the Defendant during percentage periods to distribute ratably among operators according to the actual output capacity of their mines 'all cars adapted to and used for carrying bituminous coal,' whether company fuel cars, foreign railway fuel cars or private cars, must be denied.*"

But in the present action, in determining the number of cars which the defendants in error should have received, the Commission went directly counter to the view embodied in the extract from its opinion which we have just quoted, for it determined the number of cars which the defendants in error should have received with reference to the number which certain selected mines had received, notwithstanding the fact established by the witnesses of the defendant in error, that included in the cars which had been placed at these mines were individual and fuel cars, and by so doing the Commission in effect held that the proper share of the defendants in error was their ratable share of all the cars distributed, *whether company fuel cars, foreign railway cars or private cars.*

If it be granted, as it must be, that a uniform rule or method of distribution is essential to avoid a preference

and discrimination forbidden by the Interstate Commerce Act, it would seem to be quite as essential that whatever rule is established should be uniformly applied not only by the carrier in making distribution, but by any tribunal which may be required to subsequently determine what the carrier was required to do in order to properly apply the rule to the actual distribution made by it.

There is involved in the present case also another proposition of law, the determination of which by this Court is most desirable.

Upon the argument of this case and in their brief the defendants in error, in seeking to uphold the conclusion or finding of the Commission as to the number of cars which they should have received, advanced the contention that this conclusion or finding was administrative in character and consequently not open to review by a Court.

This contention, in view of the decision of this Court in the Morrisdale case, can hardly be considered as sound, but in view of the other cases pending in which doubtless a like contention will be advanced, it is most desirable that this Court should in the present case determine whether it is or is not well founded.

Should the Court be of opinion that this case should not be restored to the Docket, then your petitioner prays that the judgment may be modified in the following respects:—

The Record shows an allowance to the defendants in error by the District Court of a counsel fee of $2500 for services rendered in the proceeding before the Interstate Commerce Commission. The plaintiff in error objected to the allowance of this fee, and an exception to the order of the Court making the allowance was granted, and the action of the Court in making such an allowance formed the basis of the Twenty-fourth Assignment of Error (Transcript of Record, page 155).

Under the decision of this Court in the Meeker case, the order in question was improper, and this was conceded upon the argument before this Court. The order allowing this fee should, therefore, be set aside.

FREDERIC D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1915. No. 139.

Pennsylvania Railroad Company, Plaintiff in Error,

vs.

W. F. Jacoby & Co., Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

No attempt is made in the Brief of the defendants in error to controvert the statement of the law embodied in the following point or request to charge submitted by the plaintiff in error which was affirmed by the trial Judge.

> "It was the duty of the defendant to apportion and deliver to the plaintiffs their fair share of all the cars available during the period of the action, for shippers in the district in which the plaintiffs' mine was located. If the plaintiffs received their fair and proper share of the cars so distributed in the district, they have no cause for complaint against the defendant upon the ground of discrimination, and the burden is upon the plaintiffs to establish by satisfactory proof, that they did not receive their share."
>
> (Transcript of Record, page 130.)

This instruction was further amplified or emphasized by the District Judge in the following extract from his general charge:—

> "If one company got half of the cars which were distributable for that system when it was only entitled to one quarter—then the amount that the other shippers, the other mine owners, would be damaged would be the amount to which their share would be diminished by giving that larger allotment to somebody else."
>
> (Transcript of Record, page 129.)

These instructions embodied a rule or principle so incontrovertible, that counsel for the defendants in error have not undertaken to question or deny its accuracy.

Accepting as correct the instructions of the District Judge, the burden was upon the defendants in error to establish by satisfactory proof that they had not received their fair share of the cars distributed in the district or region in which their mine was located. The obligation thus devolved upon them was met, as they claim, by the introduction in evidence of the finding of the Interstate Commerce Commission that the defendants in error should have received in the two periods into which the Commission divided the period of the action cars equal to 59.9 per cent. and 59.6 per cent., respectively, of their mine's rating.

The Commission did not specifically find that the cars should have been equal to these percentages, but it is a mathematical demonstration that the cars required for the tonnage for which the Commission found cars should have been received would have been equal to these percentages. (Transcript of Record, page 110.)

If these percentages were the percentages which the defendants in error would have received had they received their fair share of the cars available for distribution in the region in which their mine was located, then the Commission's finding, when put in evidence, made out a *prima facie* case for the defendants in error, but if these percentages did

not represent the *pro rata* or fair share of the defendants in error, but something else, then we submit that the submission in evidence of the finding of the Commission did not establish a *prima facie* case.

That the Commission's percentages did not represent the percentages which the defendants in error would have received, if they had received their proper share of the cars distributed in the region is, we submit, demonstrable.

The testimony established that in the two periods which the Commission's award dealt with, the cars placed at the mines in the region in which the defendants in error's mine was located amounted to 30.3 per cent. and 39.9 per cent., respectively, of the aggregate ratings of the mines in the region. (Transcript of Record, page 123.)

The Commission found that the defendants in error should have received in these two periods *59.9 per cent.* and *59.6 per cent.*, respectively, of their mine's rating. (Transcript of Record, page 110.)

These latter percentages were the precise percentages that certain mines which the defendants in error alleged had been unduly preferred had received in the two periods covered by the award. (Transcript of Record, pages 104 and 105.)

The conclusion, therefore, is irresistible that the Commission's finding as to the number of cars which the defendants in error should have received was based not upon the number which they would have received had a distribution been made of all available in accordance with the Commission's rule of distribution, but upon the number which certain mines had received which the defendants in error contended had been preferred in the distribution.

In other words, the Commission proceeded upon the theory that the defendants in error had sustained "injury" within the meaning of Section 8 of the Interstate Commerce Act because they had not received relatively the same number of cars that other mines had received which the defendants in error asserted had been favored in the distribution.

In our main brief we have called attention to the fact that the large number of cars delivered at these so-called "preferred" mines may well have been accounted for by the fact that they were receiving individual and fuel cars, and the mere fact, therefore, that in the aggregate they had received a larger percentage than the region percentage did not of itself tend to establish any preferential treatment on the part of the plaintiff in error.

But apart from this consideration the number of cars which these mines received was not the measure of the defendants in error's rights.

No attempt has been made by counsel for the defendants in error to sustain the theory upon which the Commission acted in arriving at the number of cars which the defendants in error should have received, but the contention is apparently made that the finding of the Commission on this point was an administrative finding and was consequently not reviewable by the Courts.

Manifestly, however, such a theory or view is not sustainable. The finding of the Commission as to the general rule of distribution that should have been followed by the plaintiff in error was an administrative finding, and consequently not reviewable. But the question whether the plaintiff in error violated this rule to the injury of the defendants in error is clearly not of the same character. If it were, the Courts could not entertain primary jurisdiction of cases in which such a question was involved. This Court, however, has held that the Courts have primary jurisdiction where the issue involved is whether the carrier had or had not made distribution in accordance with prescribed rules.

Morrisdale Coal Company *vs.* Pennsylvania Railroad Company, 230 U. S. 304;

Pennsylvania Railroad Company *vs.* Puritan Coal Mining Co., 237 U. S. 121.

The proposition, therefore, that in the present instance the finding of the Commission was conclusive is not sustainable.

The case, therefore, as presented to the District Court was this: the action was one to recover the amount of the award made by the Commission. (See fourth prayer of petition, Transcript of Record, page 11.)

The action was so brought because in the opinion of counsel for defendants in error Section 16 of the Interstate Commerce Act defines the action to be brought as of this character. "It is not the ordinary suit for damages, at common law," says counsel in his brief, "but *'a petition for the enforcement of an order for the payment of money.'*" (See Brief of defendants in error, page 38.)

To sustain their case the defendants in error offered in evidence only the findings of the Commission. If these findings, therefore, were erroneous for any reason, they afforded no basis for an assessment of damages by the jury. And this is true, whether we regard the action as one for the recovery of the award or for damages, for in either case it would be incumbent upon the defendants in error to make out their case by competent proof, and if the proof offered did not enable the jury to determine what cars the defendants in error should have received, then there was no predicate for any award of damages by the jury.

Assume that the action had been one to recover damages for discrimination in the distribution of cars, and that there had been no prior award made by the Commission. And assume that the only testimony in support of the defendants in error's claim had been that of a witness who had testified as to the percentage which certain mines, which it was alleged had been preferred in the distribution, had received. Manifestly, it would appear if the percentage which these mines had received was not the measure of the defendants in error's rights, the Court would have been obliged to instruct the jury that the defendants in error had failed to offer any proof which would justify a verdict in their favor.

In the present case, of course, we have in lieu of the evidence of the witness the finding of the Commission,

but if this finding is based upon an erroneous principle, it no more tends to sustain the defendants in error's case than would the testimony of the witness in the case supposed.

The defendants in error, however, urge that they were entitled to have the Commission's finding go to the jury as a finding of fact, and furthermore, that the learned Judge of the District Court, was therefore, justified in refusing to instruct the jury, as requested by the plaintiff in error, that if they found that the defendants in error, had they received their *pro rata* share of the cars distributable in the region, would not have received the percentages which the Commission's finding was based upon, that then the finding was erroneous and the verdict should be for the plaintiff in error.

The Interstate Commerce Act of course makes a finding of fact of the Commission *prima facie* evidence of the facts found therein, but certainly this does not extend to findings of fact which are based upon an erroneous construction of law and which are erroneous in principle.

Unquestionably under the decisions of this Court the present action could have been instituted in a Federal Court if the defendants in error had so elected. They preferred, however, to proceed before the Commission, but clearly the Commission in determining the rights of the defendants in error under the rule of distribution which it had prescribed was controlled by the same legal considerations which would have been controlling upon the Court had the action been instituted there, and if, therefore, a Court, if, called upon to determine the question, would have ruled that the defendants in error had been injured only to the exent to which they had been deprived of cars which they would have received had a proper distribution been made, then necessarily the Commission should have likewise ruled and its ruling or finding to the contrary necessarily lacks the sanction of law, and cannot support a recovery based upon a rule or principle of law which the Court would have been

obliged to reject as unsound if it had been advanced in a case instituted in the Court rather than before the Commission.

The learned District Judge instructed the jury that the measure of the defendants in error's rights was not the percentage received by some other shippers, but their proper *pro rata* share under the Commission's rule of distribution of the cars available for distribution. If this was a correct instruction, and its correctness has not been denied or questioned by counsel for the defendants in error in the present case, then it would clearly seem to follow that a finding by the Commission of the number of cars which the defendants in error should have received, which was admittedly based not upon the law as expounded by the Court, but upon a mistaken view of the law, ought to have been excluded from the consideration of the jury, and as there was no evidence upon which the defendants in error could recover, the jury ought to have been instructed, we submit, that the defendants in error had failed to make out a case and were not entitled consequently to a verdict.

FREDERIC D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Plaintiff in Error.

INDEX.

Page

I. The Commission computed damages on the basis of an honest administration of the rule of car distribution which plaintiff-in-error had issued covering the period April, 1904, to October, 1905, when the damage to defendants-in-error occurred..... 3

II. Since there was nothing offered by the plaintiff-in-error in this record to establish the method of computation used by the Commission, it would have been error for the Court to instruct the jury that the Commission's administrative finding of damage was based upon a particular method, such finding alone, without other parts of the record, containing no reference to the method used by the Commission in making its award, and the record before the Commission not being in evidence..... 13

III. The judgment of the District Court should be corrected in so far as it covered the counsel fee for services rendered before the Interstate Commerce Commission..... 19

Reply Brief of Plaintiff-in-Error 19

TABLE OF CASES.

Hillsdale Coal & Coke Co. vs. Penna. R. R. Co., 19 I. C. C. Rep. 356..... 4-5-6

*Hutchinson on Carriers, 146..... 21

*I. C. C. vs. B. & O. R. R., 145 U. S. 263..... 14

*Lovett vs. Hobbs, 2 Shower 127..... 21

Meeker & Co. vs. Lehigh Valley R. R. Co., 236 U. S. 412..... 7-17

Mills vs. Lehigh Valley R. R. Co., 238 U. S. 473..... 7-16

Mitchell Coal Co. vs. Penna. R. R. Co., 230 U. S. 247..... 13-14

Morrisdale Coal Co. vs. Penna. R. R. Co., 230 U. S. 304..... 9

*Peet vs. Ry., 20 Wisconsin 594..... 21

Penna. R. R. Co. vs. Clark Brothers Coal Mining Co., 238 U. S. 456..... 2-6

Penna. R. R. Co. vs. Puritan Coal Co., 237 U. S. 121..... 20

*Riley vs. Horne, 2 Bing. 217..... 21

*Southern Ry. vs. Tift, 206 U. S. 428..... 14

*Texas &c. Ry. vs. Abilene Co., 204 U. S. 426..... 14

*Texas &c. Ry. vs. Cisco Oil Mill, 204 U. S. 449..... 14

*United States vs. Pacific & Arctic R. R., 228 U. S. 87..... 14

*Cited in cases referred to by us.

IN THE

Supreme Court of the United States.

No. 139. October Term, 1915.
No. 22. October Term, 1916.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY & COMPANY,
Defendants-in-Error.

On Certificate from and Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR DEFENDANTS-IN-ERROR IN REPLY TO PETITION OF PENNSYLVANIA RAILROAD COMPANY FOR A REARGUMENT.

The petition of the plaintiff-in-error for a reargument or a modification of judgment in the above case follows the lines of their original brief. The grounds upon which a reargument is asked are two in number: (1) That the award of damages by the Com-

mission should have been declared invalid by the trial Judge; (2) that the commission in awarding damages made their calculation upon the basis of another system of car distribution than that which they had themselves declared to be the right system in their contemporaneous report in the Hillsdale case (quoted in Petition for Reargument, p. 5). As the latter proposition is alleged, in the petition, as the sole ground of the invalidity of the award, the two grounds assigned may be more simply stated thus: That the award was made up by the use of an improper and unfair method of calculation on the part of the Commission; and that the Court should therefore have charged the jury that the award was invalid.

The difficulty which the proponent of these propositions meets at the outset, lies in the question: "How do you show from the Record in this case in the District Court, on what basis the Commission made up its award?" We have in evidence the reports and award of the Commission, containing administrative findings of fact; first, of discriminations practiced by plaintiff-in-error against defendants-in-error; and, second, the tonnage which Jacoby & Co. would have shipped if they had received "their fair share of the cars," with also the primary facts upon which these ultimate facts are based. P. R. R. vs. Clark Coal Co., 238 U. S. 456, at p. 463. But none of these contain any statement of what class of cars the Commission considered in arriving at the "fair share of cars" to which Jacoby & Co. were entitled. *The entire record before the Commission was not offered in evidence in the trial Court by the Pennsylvania Railroad Company.* A part of the record before the Commission was offered as tending to show that "there was no testimony before the Commission upon which to predicate the finding which they made as to the amount

of damages." This offer was objected to on the ground that the whole record should have been offered, and the Court sustained this objection (Record, p. 75). No assignment of error is urged in argument to this ruling of the Court. Plaintiff-in-error's case, therefore, depends upon its own evidence. This consisted of one exhibit, taken from among the numerous exhibits filed before the Commission. From this alone the Court was asked to infer that the Commission made its calculation as to what number of cars Jacoby & Co. were entitled to during the period from April, 1904, to October, 1905, according to a certain method, which the plaintiff-in-error then seeks to show was an incorrect method. To establish this plaintiff-in-error claims that the Commission, in finding the discrimination and before making the award, had prescribed another method for future car distribution, (after November 1st, 1910) in that coal field.

I.

On plaintiff-in-error's own showing the Commission computed damages on the basis of an honest administration of the rule of car distribution which plaintiff-in-error pretended to be administering prior to 1906. Since the rule of car distribution provided for in an order by the Commission in 1910 was for the future only (Record, pp. 36, 37), and since, by reason of plaintiff-in-error's own misconduct, such rule would not have offered a safe basis for assessing damage in 1904-5, plaintiff-in-error has no standing to object to an assessment of damages on the basis of its own rule then in force.

The plaintiff-in-error did not put in evidence the whole record before the Commission; nor did it offer in evidence the Commission's report in the Hillsdale

case, referred to in the first report filed in the Jacoby case (Record, p. 35). The report in the Hillsdale case is merely brought in by the citation, on argument, of one paragraph or such report, which citation is again quoted in the Petition for Reargument filed by plaintiff-in-error (p. 5). This quotation, taken out of its proper connection, is misleading, and it may be proper, since the plaintiff-in-error has gone into this, for the defendants-in-error to state just what was the situation developed by the Commission in these cases, as shown by the report in the Hillsdale case, which is referred to by the Commission in its report in this case, (Record p. 35).

In the Hillsdale case, Mr. Commissioner Harlan said (19 I. C. C. Rep., p. 362):

> "We come now to the practice of the defendant in the past and at the present time in the distribution of its available coal-car equipment.
>
> "Under a rule announced by it on February 1, 1903, the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant advising them that thereafter all railroad cars, regardless of ownership, and all private cars not owned by the operator loading them, should be considered as cars available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.
>
> "On January 1, 1906, the defendant divided all cars into two classes, which it designated as 'assigned' and 'unassigned' cars. In the former class were its own fuel cars, foreign Railway fuel cars, and individual or private cars loaded by their

owners or assigned by their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any 'assigned' cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all 'unassigned' or system cars."

The discriminations here complained of occurred between April, 1904, and October, 1905, when plaintiff-in-error had in pretended operation a rule of car distribution, by which "assigned" cars were disregarded, and all cars were assigned alike, *except its own "company* fuel cars," and (*after March, 1905*) fuel cars of other railroad companies. *And if plaintiff-in-error had administered such rule fairly and honestly, there would have been no complaint filed by these shippers.*

But the alleged rule was not fairly or honestly administered. It was only an apology for a rule, while the plaintiff-in-error was in fact carrying on a most notorious system of preference to favored shippers, such preference being administered by special acts of favoritism inspired by a definite preferential purpose. Thus Mr. Harlan says, in the Hillsdale report (19 I. C. C. Rep., p. 366):

> "That the practices of the defendant with respect to the rating of mines and the distribution of coal-car equipment were, to some extent at least, in a loose and unsatisfactory condition prior to 1905 not only appears in this record, but in the record of the coal and oil investigation made by the Commission under the joint resolution of the Congress approved on May 7, 1906. There seems at that time to have been a more or less well-defined policy on the part of the defendant to discourage the opening of new coal operations."

The complaints of W. F. Jacoby & Company and

Clark Brothers Coal Mining Company arose upon exactly the same facts, and the Commission covered both claims in its report (Record, p. 30) and its supplemental report (Record, pp. 18-19). This suit was brought by Jacoby & Company to enforce the order of reparation by the Commission, but after the report of the Commission finding the discrimination, Clark Brothers Coal Mining Company did not await an order of reparation by the Commission, but brought its action for damages in the State Court of Pennsylvania. The case finally reached this Court, where it was held that the State Court of Pennsylvania did not have jurisdiction, but that Clark Brothers Coal Mining Company was limited to the remedy provided in Section 9 of the Act to Regulate Commerce.

In the case of *Pennsylvania Railroad Co. vs. Clark Brothers Coal Mining Co.*, 238 U. S. 456, this Court, by Mr. Justice Hughes, at page 460, reviews fully the report in the case of *Hillsdale Coal & Coke Co. vs. Pennsylvania Railroad Co.*, 19 I. C. C. 356, and the reports of the Commission in the present case (Record, pp. 18, 19, 30), which also covers the claim of Clark Brothers Coal Mining Company, both as to the finding of discrimination and damages, and then says (p. 463):

> "The Commission then made its report as follows: 'We now find that the damages sustained by this claimant (Clark Bros. Coal Mining Co.) as result thereof' (the discrimination found) 'amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.' "

The finding on the Jacoby & Company claim was exactly the same, except in the amount of reparation (Record, p. 18.) This Court then says (p. 463):

> "The Commission set forth its primary findings of fact upon which this ultimate finding was

based, showing its calculations with respect to shipments, selling prices, cost of production and profits during the times in question. It found the number of tons, in case of each of the mines, actually shipped and the amount which would have been shipped and sold, with *a proper car supply*, for 'interstate destinations,' that is, for points without the State of Pennsylvania." (Italics ours.)

This is just as applicable to the Jacoby & Company claim as that of the Clark Brothers Coal Mining Company, and covers every necessary finding by the Commission upon which to base its order for reparation. See *Meeker & Co. vs. Lehigh Valley Railroad Co.*, 236 U. S. 412; *Mills vs. Lehigh Valley Railroad Co.*, 238 U. S. 473 (at p. 477). The Commission finds what tonnage Jacoby & Company would have shipped if they had received "their fair share of the cars available for distribution" (Record, p. 18), and upon that basis made the order for reparation, and the jury in the District Court having heard the plaintiff-in-error's defence, rendered a verdict for the amount found by the Commission, and judgment was entered by the District Court for that amount. The plaintiff-in-error now says that the Commission was wrong in the amount of damages awarded, because in arriving at the tonnage which Jacoby & Company would have shipped if they "had received their fair share of the cars available for distribution," the Commission erroneously counted cars which should not have been fairly counted, and in support of its contention the plaintiff-in-error referred to the order of 1910, made by the Commission for the future (Record, pp. 36-7), and offered in evidence, not the entire record before the Commission, but one exhibit out of that record, to show that the tonnage which the Commission found Jacoby & Company would have shipped if they had had their "fair share of cars" could

not have been shipped by them under the system of distribution prescribed by the Commission in its order for use after November 1, 1910.

To this we answer: that the question of what cars should have been counted during the period, April, 1904, to October, 1905, in order to make a fair *pro rata* distribution of coal cars among shippers, was an *administrative question*, to be determined by the Commission on the whole record before it, and this Court will not undertake to substitute its judgment for that of the Commission upon this administrative question. In finding the cars to be counted in the distribution, it was not necessary that the Commission should adjust the car distribution during the period, April, 1904, to October, 1905, to the basis of distribution ordered by the Commission after November 1, 1910. Other elements were involved during the period covered by the complaint, to wit, the rule of distribution of the railroad company referred to in the Hillsdale case; the fact that the railroad company made a daily special distribution of 500 of its cars to Berwind-White Coal Mining Company (Record, p. 34); the fact that the railroad company sold 1,000 of its own system cars to Berwind-White Coal Mining Company (Record, p. 35); the fact that coal in cars furnished for railroad fuel coal got into commercial competition in the market—all these, and other facts before the Commission might well have justified it in finding the fair proportion of the cars to which the defendants-in-error were entitled during this period, and not adjusting the basis of its finding to the system of distribution provided for the future. In finding what is a fair distribution of cars, the Commission is not bound by a "hard and fast rule," but especially as to past transactions, adjusts its finding to the facts before it in that particular case. *Morrisdale Coal Co.*

vs. Pennsylvania Railroad Co., 230 U. S. 304, at pp. 312-13.

The award was made by the Commission based "upon evidence adduced of record" (Record, p. 18), and yet this Court is asked to reverse the finding of the utlimate facts as to the tonnage Jacoby & Company would have shipped if they "had received their fair share of the cars available for distribution," and substitute the judgment of this Court as to what cars should have been counted by the Commission in the exercise of its administrative discretion, and that, too, upon a part only of the record before the Commission.

The figuring by the plaintiff-in-error of percentages to show what cars Jacoby & Company should have received during the period from April, 1904, to October, 1905, if the rule prescribed by the Commission for use after November 1, 1910 (Record, p. 37) had been applied to that period, can have no bearing in this case. The rule for the future (after November 1, 1910) may well have been considered by the Commission as inapplicable to the period from April, 1904, to October, 1905, when the railroad company had a rule providing for counting practically all cars and violated this rule, and upon all the facts the Commission found what would have been the tonnage shipped by Jacoby & Company if they "had received" what the Commission concluded in its administrative discretion woud have been "their fair share of the cars available for distribution," which necessarily involved the question of what cars should, during that period, have been counted for the *pro rata* distribution; and we submit that this Court should not set aside the Commission's conclusion and substitute therefore what *it* may conclude was Jacoby & Company's "fair share of the cars."

How improperly and unfairly this whole system

of alleged private and fuel cars was carried on by the plaintiff-in-error, was very fully shown before the Commission, and is to some small extent referred to in this record. Thus it appears that all shippers did not enjoy the right to put on private cars, while to certain favored shippers the plaintiff-in-error was so complaisant that it "sold" them its own cars, which thereafter appeared as their private cars. (19 I. C. C., p. 395.) Nor were the company fuel cars more honestly administered; for the company fuel coal reappeared in the market in competition with the coal of the independent shippers (Record, p. 118). There were many other abuses, some of which are referred to in the Commission's reports; but the above will indicate how little confidence could be placed by the Commission in the plaintiff-in-error's classification of cars in this coal field.

The Commission was therefore confronted with this situation: Prior to 1906, plaintiff-in-error pretended to assign all cars (except certain *alleged* fuel cars) *pro rata* to all shippers alike, but did not do so; after 1906, defendants-in-error put into effect a new rule of distribution based upon "assigned" cars and rated mine capacity, calculated by deducting from each mine's tonnage the tonnage of such "assigned" cars.

In such a state of affairs, the Commission was unable to adjust the past situation upon the basis of any rule of car distribution for the future. The new system of "assigned" cars and commercial ratings, put into force in 1906, was found to be in effect a cover for discrimination. As the Commission said in the Hillsdale case, only "substantial justice" could be done, and such substantial justice could only be accomplished by requiring "defendant to adjust its rules upon a proper basis *for the future*," and giving "to the com-

plainants the opportunity to have their injury redressed in the form of damages." (19 I. C. C., p. 366.) Both these things the Commission attempted to do upon all the facts before them, which facts were not offered in evidence by plaintiff-in-error, in the District Court and are not before this Court.

The injury to defendants-in-error had occurred between April, 1904, and October, 1905, during the period when there was no fair system of car distribution, honestly administered, in effect in this region. The system of "assigned" cars did not then exist. Plaintiff-in-error was then avowedly distributing all cars alike, regardless of ownership, and should have honestly done so. That it did so no one has attempted to affirm. It is immaterial here that plaintiff-in-error put the "assigned" car system in effect in 1906, or that the Commission, in 1910, declared that such system was discriminatory and prescribed a new system for the future. None of this can have any bearing upon the old method or want of method in force prior to 1906, when the injury to W. F. Jacoby & Company occurred; and plaintiff-in-error had no standing to require that the Commission, in awarding damages, should attempt to apply its new system of car distribution to the conditions existing prior to 1906; even if this were possible, which does not appear.

The Commission was not obliged to compute past damages upon the basis of its rule announced for "the future." It may well have been impossible for it to do so. During the period when the injury to defendants-in-error occurred, plaintiff-in-error did not recognize "assigned" cars, as a basis for distribution, nor does it appear that there was any way by which the Commission could have determined what were and what were not *bona fide* "assigned" cars during the period prior to 1906.

The plaintiff-in-error's theory therefore amounts to this: That the Commission, confronted by the situation in 1904-5 made no attempt to assess damages on the basis of its rule announced in 1910 for the future, but instead accepted the plaintiff-in-error's own rule, supposed to be in operation in 1904-5, and found as damages the difference between the tonnage in cars actually received by defendants-in-error and the tonnage which defendants-in-error would have received if the plaintiff-in-error had honestly administered its own rule of distribution, in effect or pretended effect in 1904-5.

It is hard to see how plaintiff-in-error could have any standing to complain of this measure of damages, if it were in fact the measure of damages applied. The Commission would be merely judging plaintiff-in-error out of its own mouth. Having declared that it was distributing its cars upon a certain basis, and having, by its own acts, made it practically impossible for the Commission to assess damages upon any other basis, it is certainly a remarkable proposition that plaintiff-in-error can demand that the Commission assess damages on the basis of a rule for the future, announced five years later, especially since in making such assessment, the Commission would have to accept as verity plaintiff-in-error's own statement as to what were and what were not entitled to be called "assigned" cars in 1904-5, when plaintiff-in-error did not recognize "assigned" cars as a basis for distribution.

There is no point in plaintiff-in-error's assertion (petition, pp. 2, 5) that a confusion as to the proper method of car distribution may result from the decision in this case. The Commission has now fixed a system of car distribution, just as it often fixes new systems of rates. That system would not be disturbed

by an award of damages, however made up, based upon a former system of car distribution in existence long before the new system was prescribed or put into effect.

II.

Since there was nothing offered by the plaintiff-in-error in this record to establish the method of computation used by the Commission, it would have been error for the Court to instruct the jury that the Commission's finding of damage was based upon a particular method, such finding alone without other parts of the record, containing no reference to the method used by the Commission in making its award, and the record before the Commission not being in evidence.

In the case of *Mitchell Coal Co. vs. Pennsylvania R. R. Co.*, 230 U. S. 247, at page 257, the Court through Mr. Justice Lamar, says:

> "But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice."

And again, at page 258, it is said:

> "It is argued that under the *Abilene, Robinson* and *Pitcairn Cases* this may be true as to existing rates in which the public have an interest, but it is urged that a claim based upon the unreason-

ableness of past rates and discontinued practices raises a judicial question, of which the courts and not the Commission have jurisdiction.

"There are several answers to this proposition. In the first place, the plaintiff cannot claim under the act and against it. To say the least, it is extremely doubtful whether, at common law, one shipper had a cause of action because the carrier paid another shipper more than the market value of transportation services rendered to the carrier. *I. C. C. v. B. & O. R. R.*, 145 U. S. 263, 275. But if any such right existed it was abrogated or forbidden by the Commerce Act, and one was given which, as a condition of the right to recover, required a finding by the Commission that the allowance was unreasonable and operated as an unjust discrimination or as an undue preference. *Texas &c. Ry. v. Cisco Oil Mill*, 204 U. S. 449; *Texas &c. Ry. v. Abilene Co.*, 204 U. S. 426, 444; *Southern Ry. v. Tift*, 206 U. S. 428, 437; *United States v. Pacific & Arctic R. R.*, 228 U. S. 87. Such orders, so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the act given its day in court and the right to a judicial hearing. (March 2, 1889, 25 Stat. 855, 859, c. 382)."

See also, our brief heretofore filed.

The plaintiff-in-error is seeking to reopen here certain questions of fact which were finally determined before the Commission, and it is seeking to do so on the basis of a very small part of the evidence which was before the Commission.

If this can be done, the Commission's finding is not an aid but a detriment to a complainant before that body. For, after the Commission has heard all the evidence and has properly ruled on the discrimination, and has made an award, the defendant can assert in the trial Court that the Commission's award was improperly made up; can introduce such parts of the evidence as support its theory; and can assert its theory against the award, even after the award has been approved by the verdict of a jury.

It may very well be questioned, whether, under the peculiar circumstances of this case, as above set forth, the trial Judge did not go unduly far in charging the jury in plaintiff-in-error's favor, on the question of damages, but plaintiff-in-error, notwithstanding, insists that the Court should have left nothing to the jury, but have directed them that the award was invalid.

The trial Judge could not know what was in the mind of the Commission when it made up its award. He could at best only infer or assume, and neither inference nor assumption on a question of fact has a place in courts of law. The Court allowed plaintiff-in-error to introduce one exhibit, on which such an inference might be based; but this inference was confronted by a counter inference, at least equally strong, that the Commission knew what it was about. The Court, therefore, left to the jury the question whether damages had been assessed upon the theory advanced by plaintiff-in-error. The jury evidently preferred to believe that the Commission correctly made up the award.

To go back and attempt to discover the basis upon which such award was computed by the Commission is now a hopeless matter on the present record. The case

is not one which can be met by a discussion of possibilities or even of probabilities. Clearly the rule of car distribution appealed to by plaintiff-in-error was present in the mind of the Commission when that body found discriminations and made an award. It cannot be presumed or even inferred that they deliberately computed such award on an unfair basis. The Commission did not and is not required to set forth its calculations in detail in its report. It properly found the ultimate facts, which was all that the Act requires. *Mills vs. Lehigh Valley R. R.*, 238 U. S. 473, at pp. 481-2. The trial Court went to the end of its powers in allowing the jury to find whether damages had been properly computed and allowed. The award, as affirmed by the jury, should be conclusive here.

A few words may be said by way of showing further the difficulty of impeaching or opening the award at this stage of the case. It has already been stated that the *bona fides* of private car ownership and fuel car distribution in this field was gravely impeached. There had been pretended transfers of the railroad's own cars to private ownership; there was fuel coal, which, in some mysterious manner, found its way into the market. A hint of this found its way into the record here, but there was much of it in evidence before the Commission. It is, therefore, insufficient to say that such and such private and fuel cars were not excluded from the account before distribution; for the Commission may very well have believed that such cars were not *bona fide* entitled to be so excluded. *This, in itself, would justify the award*, even granting that such award merely repeated the calculation in the one exhibit, put in evidence by the plaintiff-in-error.

Moreover, it will be remembered that the Commission's finding of discriminations practiced by plaintiff-

in-error against these defendants-in-error was not limited to the one matter of the assignment of regional cars among the mines in this one division or district. There were also found to be discriminations practiced against the whole district by the arbitrary assignment of cars to favored mines on other branches of the railroad. Both these discriminations formed the basis of the complaint filed; and the sum claimed in damages was based upon both. The Commission presumably considered both, for it had found discrimination in both respects. The Court and the jury were therefore under no compelling necessity to infer that the award of damages, as handed down, was based entirely upon the one kind of discrimination.

In *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412, this Court said (p. 429):

> "The plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon *the evidence adduced*, it must be presumed, there being no showing to the contrary, that they were justified by it." (Italics ours.)

The same situation exists here as in the Meeker case. The supplemental report of the Commission (Record, p. 18), finds, "upon evidence adduced of record" (Record, p. 18), that:

> "By reason of the *discriminations* ascertained and set forth in our report in Jacoby v. P. R. R. Co., 19 I. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907. The claimants here demand $51,950.49. *The award above made we base upon evidence adduced of record, from which we find.*" (Italics ours.)

The Commission then finds that "if the complain-

ants had received "their fair share of the cars available for distribution" the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods."

In the Meeker case, it was alleged (236 U. S. 412, p. 428) "that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award"; but this Court, after quoting the language of the award, said (p. 428): "In this we perceive nothing pointing to an erroneous and inadmissible measure of damages."

Certainly the same might be said in the present case, unless it is to be held that the Commission's finding of the tonnage that defendants-in-error were entitled to have shipped in the period from April, 1904, to October, 1905, was erroneous, because it did not conform to a system of car distribution prescribed by the Commission for use after November 1, 1910.

There are few persons who could defend the system of car distribution in the Clearfield Division in the years 1904-5, a period in which certain favored shippers made vast fortunes, while certain other shippers were unable to operate and were ruined or forced out of business. The conditions then existing may have been relieved by the activity of the Commission, and facilities of car distribution have been sensibly relaxed in view of the changed conditions, and under the rule for future distribution announced by the Commission in 1910. But it was during 1904-5, a period of general disregard or evasion of the law by plaintiff-in-error and its favored shippers, that this case arose, and it has been carried from point to point, with great labor and expense, until, after a lapse of eleven years (which

period has been spent not in silence or delay on the part of these defendants-in-error, but in active prosecution of their claim), the matter comes up for final disposition in this Court. There has been an award by the Interstate Commerce Commission, a verdict of a jury, and a judgment of a Court in favor of the complainants. They are now, in the Court of last resort, met with an objection, based upon an inference as to matters occurring before the Commission not in evidence, and upon a theory as to the state of mind of the Commission when making up its award in 1912.

It is respectfully submitted that this Court should refuse to consider or pass upon such matters, and should sustain the findings of the Commission, as confirmed by the verdict and judgment in the trial Court, and that the judgment below should be affirmed.

III.

Plaintiff-in-error has also requested that the judgment be modified, so as to set aside the judgment for counsel fee allowed for services rendered before the Interstate Commerce Commission. Since this question has been decided by this Court in the Meeker case, the matter is not in dispute, and defendants-in-error stand ready to submit to such order, or to enter a remittitur, as this Court may prescribe.

REPLY BRIEF OF PLAINTIFF-IN-ERROR.

In a brief just filed by plaintiff-in-error, entitled "Reply Brief of Plaintiff-in-Error," at page 3, we find the following:

> "The Commission found that the defendants-in-error should have received in these two periods 59.9 per cent. and 59.6 per cent. respectively, of

were the days (275 and 138¼ days respectively) which the mine actually worked. The Commission found the tonnage that defendants-in-error would have shipped *in the two periods*, (not for 275 days and 138¼ days, respectively) if they had been given their fair proportion of cars.

Aside from this, however, the above quotation from the plaintiff-in-error's reply brief is an incorrect statement of fact. The Commission found (Record, p. 18) that defendants-in-error were only able to actually operate their mine for 275 days in the first period and 138¼ days in the second period. Referring to this finding of the Commission the plaintiff-in-error, in its brief, refers to Record, p. 110, to show that the total capacity of the mine for 275 days, at 450 tons per day, was 123,750 tons, and for 138¼ days, the second period, the total capacity at 450 tons a day, was 62,212.51 tons, and the witness Sanders, at page 110, then adds the shipments which were actually made by defendants-in-error during the first period (38,714.23 tons), to the additional tonnage which the Commission found the defendants-in-error would have shipped if they "had received their fair share of the cars available for distribution" (35,412.02 tons), and arrives at a total of 74,126.25 tons, which amount is 59.9 per cent. of 123,750 tons, (the total capacity for 275 days), and therefore the plaintiff-in-error asserts that the Commission based its conclusions upon the defendants-in-error shipping the same percentage as the preferred shippers, to wit, 59.9 per cent., which was based on 308 days. A like method is used by the plaintiff-in-error by which it arrives at the conclusion that the Commission found that the defendants-in-error would have shipped 59.6 per cent. of their rated capacity for 138¼ days during the second period. Plaintiff-in-error then says that it is evi-

dent that the Commission based its conclusions upon the defendants-in-error being entitled to ship the same percentage of the rated capacity of their mine, as those mines shipped, which were preferred in the distribution. The percentages above were based upon the mine only being able to operate even with the additional shipments found by the Commission, for the 275 and 138¼ days respectively, the time which the mine actually operated under the unfair allotment of cars, whereas the average percentages of the favored shippers were based on a car supply which enabled them to operate their mines for 308 and 167 days respectively (Record, p. 104-5).

This statement of plaintiff-in-error is clearly incorrect. The average percentage for the first period of 59.9 per cent., and for the second period of 59.6 per cent. (Record, pp. 104-5), was based upon the rated capacity for 308 days and 167 days respectively, and if the defendants-in-error had shipped the amount of coal which the Commission found that they would have shipped in addition to their actual coal shipments for the 308 days, out of the period of one year, they would have shipped during the first period 53 per cent. of their rated capacity, and during the second period of 167 days between April and October, 1905, 49 per cent. of their rated capacity, as against the average percentages of the twelve preferred mines of 59.9 per cent. during the first period and 59.6 per cent. during the second period.

The Commission had before it all of the distribution sheets and a complete record of the methods of car distribution, and upon all these facts found that for the period April, 1904, to March 31, 1905, if defendants-in-error "had received their fair share of the cars available for distribution", they would have shipped 35,412.02 additional tons of coal, and for the second period, April 1st to October 18th, 1905, 19,104.77 additional tons of coal. This is dependent upon the finding by the Commission as to what cars should have been counted and what should have been the basis of distribution of the cars, and what would have been a fair distribution.

We submit that the conclusion of the Commission upon that question is a final conclusion.

The Commission then finds that defendants-in-error were damaged, and sets forth its method of arriving at the damage (Record, p. 18—(c), (d), (e)—), and this finding of the Commission was entitled only to *prima facie* effect, all of which was submitted to the jury, under a charge certainly as favorable as the plaintiff-in-error could have reasonably asked, and we, therefore, submit that the finding of the Commission as to what should have been the system of car distribution and the tonnage which defendants-in-error would have shipped upon such fair distribution of cars, is conclusive, and that the finding of the jury on the question of damage affirming the finding of the Commission, which made a *prima facie* case, is conclusive in this Court.

Again, at page 3 of their reply brief, counsel for plaintiff-in-error say:

> "The testimony established that in the two periods which the Commission's award dealt with, the cars placed at the mines in the region in which the defendants-in-error's mine was located,

amounted to 30.3 per cent. and 39.9 per cent., respectively, of the aggregate ratings of the mines in the region. (Transcript of Record, p. 123.)"

The fact that the number of cars for the two periods in the region represented 30.3 per cent. and 39.9 per cent. of the aggregate rating of the mines in the whole region, can have no bearing upon the Commission's conclusion as to what the *actual distribution* of cars should have been and what tonnage under that distribution should have been shipped by defendants-in-error, for the reason that the plaintiff-in-error leaves out of calculation the great number of mines which appeared before the Commission as voluntarily not shipping coal at all, during these periods (Record, p. 115-6), and any cars to which such mines would have been entitled had they been shipping, were subject to pro rata distribution to the mines which were actually shipping coal. If all of the mines had been shipping coal, according to the plaintiff-in-error's theory, no mine could have properly gotten more during the first period than 30.3 per cent. of its rated capacity, and during the second period 39.9 per cent. of its rated capacity, yet Standard No. 7 mine, during the first period, had 88.9 per cent. of its rated capacity, and during the second period 76.8 per cent. of its rated capacity; and the twelve mines owned by the preferred shippers, during the period as a rule had more than double the cars which they would have gotten if all the cars in the region had been distributed to all the mines in the region on the capacity basis. The only conclusion that could be drawn by the Commission, and by the jury, was that the plaintiff-in-error had cars subject to pro rata distribution by reason of certain of the mines voluntarily not working, which they gave to preferred shippers instead of distributing pro rata.

Wm. A. Glasgow, Jr.,
Counsel for Defendants-in-Error.

October, 1916.

PENNSYLVANIA RAILROAD COMPANY *v.* W. F. JACOBY & COMPANY.

ON CERTIFICATE FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 22. Argued October 20, 1915; affirmed by divided court November 15, 1915; restored to docket for reargument December 20, 1915; reargued October 23, 24, 1916.—Decided December 4, 1916.

In an action against a carrier to enforce an award made by the Interstate Commerce Commission for damages arising from discrimination in allotments of coal cars, plaintiffs, to prove the damage suffered, relied on the *prima facie* case made by the findings and orders of the Commission; the defendant introduced a tabulated statement of car allotments and percentages which had been introduced in evidence before the Commission by the plaintiffs, and which, when compared with the findings, justified most strongly, if it did not compel, a deduction that, in fixing the damages awarded, the Commission, by misapplying percentages given in the statement, had followed a legally erroneous method of computation and so had arrived at a legally erroneous result.

Held: (1) That the tabulated statement, and oral testimony comparing it mathematically with figures stated in the findings, were competent evidence, tending to overcome the *prima facie* force of the Commission's orders.

(2) That the defendant was entitled to a specific instruction to the effect that, if the jury found such erroneous method of computation was the one actually employed by the Commission, the award was erroneous and the plaintiffs not entitled to recover.

(3) That, under the circumstances, the fact that the evidence before the Commission was not all before the court would not justify a controlling presumption that the award was properly arrived at on competent proofs.

(4) That the error was not cured by divers general instructions which are stated in the opinion.

In computing damages resulting from discrimination by a carrier in car allotments, it is error to assume that the complaining shipper should have received cars in the same ratio to shipping requirements

as was allowed his favored competitor in the making of the discrimination.

The award should be based on the damages actually resulting from the discrimination.

THE case is stated in the opinion.

Mr. Francis I. Gowen and *Mr. John G. Johnson*, with whom *Mr. F. D. McKenney* was on the briefs, for Pennsylvania Railroad Co.

Mr. Wm. A. Glasgow, Jr., for Jacoby & Co.

MR. JUSTICE DAY delivered the opinion of the court.

Jacoby & Company, hereinafter called the plaintiffs, owned a coal mine known as Falcon No. 2 in the Clearfield District served by the Tyrone Division of the lines of the Pennsylvania Railroad Company, hereinafter called the Company, and shipped coal from their mine in interstate commerce. In June, 1907, the plaintiffs made complaint before the Interstate Commerce Commission of discriminatory practices against them in the distribution of coal cars, in violation of the Act to Regulate Commerce. The Commission made findings, among others, that Falcon No. 2 was not placed on an equal footing with the mines of the Berwind-White Coal Company in the matter of the distribution of the defendant's available coal car equipment during the period of the action. It also found a special allotment of 500 cars daily to the Berwind-White Company to be an undue preference and discrimination, and on March 7th, 1910, the Commission made an order, finding that the complainants had been unduly discriminated against, and set forth that it appeared "that it is and has been the defendant's rule, regulation and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage

periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as 'assigned cars,' from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all 'unassigned' cars." The Commission ordered "That the said rule, regulation and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated and is in violation of the third section of the Act to Regulate Commerce" and "That the defendant be, and it is hereby, notified and required, on or before the 1st day of November, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them."

At the same time, the Commission ordered that the question of damages sustained by the plaintiffs in respect to the matters and things in the report found to be discriminatory be deferred pending further argument. See also 19 I. C. C. 392, where the decision is reported. In that case the Commission referred to its report filed the same day in the case of *Hillsdale Coal & Coke Company* v. *Pennsylvania Railroad Company*, 19 I. C. C. 356, in which the discriminatory character of the rules of car distribution of the Company is fully discussed (page 364) and the rules are condemned, largely because of the advantages given to the owners of private cars unless the same shall be counted against the distributive share of the mine receiving them. See also the discussion of these rulings in

Pennsylvania Railroad Company v. *Clark Coal Company*, 238 U. S. 456.

On March 11, 1912, the Commission made a further report, in which it found as follows:

"We find that by reason of the discriminations ascertained and set forth in our report in *Jacoby* v. *P. R. R. Co.*, 19 I. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

"The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record from which we find:

"(a) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

"(b) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

"(c) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

"(d) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

"(e) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits for the coal actually shipped during the period in question."

On March 11th, 1912, the Commission made a reparation order in favor of the plaintiffs, confirming its former orders, findings and conclusions, and ordering that the Company should pay to the plaintiffs on or before the first day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of six per cent. per annum from June 28th, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination had been found by the Commission to be unlawful and unjust. Upon these orders of the Commission, suit was brought in the District Court of the United States for the Eastern District of Pennsylvania, on July 19th, 1912, the action being based upon § 16 of the Act to Regulate Commerce, 34 Stat. 590. The case was heard in the District Court, and resulted in a verdict for the amount awarded by the Commission, with interest thereon. On the case going to the Circuit Court of Appeals, that court certified certain questions to this court, and upon writ of certiorari the whole record was brought here.

The case was argued before this court at the October term, 1915. At that term the judgment below was affirmed, with costs, by a divided court. Afterwards, and at the same term, a petition for rehearing was granted and the former judgment set aside, and the case restored to the docket for reargument. 239 U. S. 631.

At the trial in the District Court the plaintiffs offered

no other testimony as to the amount of damages sustained by them than that contained in the orders of the Commission, before recited. Section 16 of the Act makes the findings and orders of the Commission *prima facie* evidence of the facts therein stated, and it may be conceded that if no testimony was offered in the case to overcome the *prima facie* case thus made, the orders of the Commission would be controlling and determine the amount of recovery. The *prima facie* character of the findings of fact and award of damages by the Commission was established upon full consideration of the subject in *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 426–431, and second *Meeker Case*, 236 U. S. 434. This court said in *Mills* v. *Lehigh Valley Railroad Co.*, 238 U. S. 473, 481, after quoting from the *Meeker Cases*, *supra*, "The statute was not concerned with mere forms of expression and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the Commission effect as *prima facie* evidence, we think that the court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim."

In order to meet the *prima facie* case made by the plaintiffs upon the orders of the Commission in awarding damages, in the course of the testimony the Company put in evidence certain sheets, which were offered in evidence before the Commission by the plaintiffs, in the hearing before that body, known as Exhibit No. 10. These sheets were entitled "Detailed statement showing discrimination in favor of other mines and against Falcon No. 2 [the mine of the plaintiffs] from April 1, 1904, to April 1, 1905," and "from April 1, 1905, to October 15, 1905," respectively, these being the periods for which recovery was sought in this case by the plaintiffs. These sheets undertook to show the percentage of cars awarded to certain preferred companies by the Railroad Company, as com-

pared to those awarded to the plaintiffs for use in their mine during the period stated. They were intended to show that the favored companies received cars during the first period to the extent of 59.9% of their mine ratings, and during the second 59.6% of their mine ratings, which percentages were much larger than the plaintiffs received for their mine during the like periods. In other words, it was thus sought to establish that the favored mines received, not their just proportion of the distributable cars, but a much larger, and highly discriminatory, share when compared with the allotment made to the plaintiffs. It is the contention of the Company that it is demonstrable from this record that these tables showing the percentages awarded to favored companies were made the basis of the Commission's award of damages.

We have already seen from the orders of the Commission, above recited, the manner in which it made its award and reached its conclusion as to the amount recoverable by the plaintiffs. At the trial in the District Court, the Company placed a witness upon the stand, who testified as follows:

"Q. Referring to the order which has been put in evidence made by the Interstate Commerce Commission, finding a certain amount as due Jacoby & Company, will you please say whether you have taken the daily rating fixed by the Commission as proper, namely, 450 tons per day, and multiply that by 275 days, the days which the Commission found the plaintiff's mine would have been able to work in the year ending March 31, 1905, and tell us what the aggregate number of tons is, based upon those two figures?

"A. 123,750 tons.

"Q. In that same order the Commission has found that the plaintiff shipped in that period 38,714.23 tons and that they ought to have received cars which would have enabled them to ship 35,412.02 tons additional. If they had made

those additional shipments what would the total volume of shipments have been?

"A. 74,126.25 tons.

"Q. What percentage of the aggregate capacity of the mine, based upon 450 tons per day and 275 days, are the aggregate shipments which would have been made, which you have just spoken of?

"A. 59.9 per cent.

"Q. Coming to the second period of the action, the Commission found that 450 tons per day was a proper rating for the mine and that the mine would have been capable of working 138¼ days. What, on that basis, is the aggregate capacity of the mine in that period?

"A. 62,212.51 tons.

"Q. In their order the Commission found that in that period the mine had shipped 17,973.88 tons and that it should have received cars which would have enabled it to ship 19,104.77 tons additional. If it had made those additional shipments, what would have been the total shipments in that period?

"A. 37,078.65 tons.

"Q. And what percentage is that of the aggregate rated capacity based on 450 tons a day and 138¼ days?

"A. 59.6."

This testimony was competent in order to meet the plaintiffs' case based on the orders of the Commission, and from it we think the conclusion is inevitable that the Commission may have used the percentages of 59.9% and 59.6% respectively in reaching the amount of damages awarded to the complainant. If so, the recovery was permitted, not upon the basis of damages sustained by reason of the illegal discrimination practiced against the plaintiffs as found by the Commission, but upon the basis that they were entitled to receive cars equal in ratio to those illegally and preferentially given to the certain favored companies named in the tables. The effect of

the enforcement of such rule, would be, not to give the shipper the damages which he actually suffered, but would base the recovery upon a rule which is condemned as to others, because of its discrimination in their favor,—a result manifestly not intended by the Act of Congress.

The testimony being in the condition which we have stated, and the plaintiffs having offered no testimony to show the amount of damages sustained other than that contained in the order made by the Commission, the Company made certain definite requests to charge, which were refused. In one of them, they requested a peremptory instruction in favor of the Company upon the ground that as the award of the Interstate Commerce Commission was based upon the conclusion that in the year ending April 1st, 1905, the plaintiffs should have received cars equal in capacity to 59.9% of the aggregate of their daily mine rating for 275 days, and in the period between April 1st and October 18th, 1905, cars equal in capacity to 59.6% of their daily mine rating for 138¼ days, it was apparent that this conclusion of the Commission was based upon the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located, had been equal in the earlier period to 59.9% and in the later period 59.6% of the aggregate ratings of these selected mines. If the court should refuse to charge as above requested, the court was requested to instruct the jury as follows:

"8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine ratings, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine ratings, was reached or arrived

at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9% and in the later period to 59.6% of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

In view of the testimony as we have already stated it, we think the Company was entitled to have this eighth request given in charge to the jury. Nor do we think this refusal was cured by the charge that the finding of the Commission was *prima facie* correct, and entitled to weight as such unless the defendant produced evidence to show that some other state of facts existed, and that the plaintiffs had not suffered the damages awarded to them by the Commission, and the charge in general terms that it was the duty of the Company to apportion and deliver to the plaintiffs their fair share of all cars available during the period of the action to shippers in the district in which plaintiffs' mine was located, and that if plaintiffs received their full and proportionate share of cars in the district they had no cause for complaint against the Company and the burden was upon the plaintiffs to establish by satisfactory proof that they did not receive their share; nor by other parts of the charge in which the jury was told in general terms that the shipper was entitled to recover the full amount of damages which he sustained, and that in arriving at such damages the jury could only take into consideration whether they had been discriminated against, and to what extent they were damaged by that discrimination, and that, if the Berwind-White Company got 59 per cent. of its output when the average allottable was 28 per cent., it did not necessarily follow that the plaintiffs would be damaged the entire difference between

28 per cent. and 59 per cent., but their damage would be the amount to which their number of cars was reduced in the general allotment by favoring somebody else and taking the cars from them. However correct these general observations may have been, we think it was error in the state of the record to which we have already referred to refuse the specific charge requested.

It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentages shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury.

For error in refusing to give this request in the charge, the judgment of the District Court must be reversed, and the case remanded to that court for a new trial.

Reversed.

Dissenting, MR. JUSTICE PITNEY.